Supreme Court, U.S.
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In The

Supreme Court of the United States

BOB BURRELL and SUSAN BURRELL,

Petitioners,

v.

LEONARD ARMIJO, Governor of Santa Ana Pueblo and Acting Chief of Santa Ana Tribal Police; LAWRENCE MONTOYA, Lt. Governor of Santa Ana Pueblo; NATHAN TSOSIE, Tribal Administrator of Santa Ana Pueblo; JERRY KINSMAN, Farm Administrator of Santa Ana Pueblo; and the SANTA ANA PUEBLO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Tenth Circuit Court of Appeals properly dismiss the Pueblo of Santa Ana based on Tribal Sovereign Immunity?

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Burrell v. Armijo, No. 03-2223 (10th Cir. 7/24/06)

STATEMENT OF THE BASIS FOR JURISDICTION

On July 24, 2006, the Tenth Circuit Court of Appeals issued its Opinion in *Burrell v. Armijo*, No. 03-2223 (10th Cir. 7/24/06).

On October 18, 2006, Supreme Court Justice Breyer granted an extension of time to and including November 22, 2006, to file a petition for a writ of certiorari.

Title 28 U.S.C. §1254 confers on this Court jurisdiction to review on a writ of certiorari the judgment of the Tenth Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case:

Indian Civil Rights Act of 1968, 25 U.S.C. §1302
25 U.S.C. §229
42 U.S.C. §§1981, 1983, 1985
(Full text included in Addendem)

STATEMENT OF THE CASE

On April 14, 1998, the Respondents (hereinafter referred to as the "Burrells") filed their first federal complaint in the U.S. District Court for New Mexico, *Burrell v. Leonard Armijo, et al.*, CIV 98-0438 JC/WWD, which was dismissed on September 2, 1998, on the grounds of failure to exhaust tribal remedies. [App. 226,

citation is to the Appendix filed with the Tenth Circuit] The Burrells then immediately filed the same action in the Santa Ana Tribal Court, *Burrell v. Leonard Armijo, et al.*, SA CV-123-98, which included the same federal constitutional tort claims. [App. 254, pleadings from the Tribal Court case were reconstructed and filed in the record and are contained in the Appendix] After four years of no action by the tribal judge on pending motions or a requested jury trial, on May 14, 2002, Burrells re-filed their second federal complaint in *Burrell v. Armijo*, No. CIV 02-542 WJ/DJS (D.N.M.), relying on the district court's jurisdiction based on 28 U.S.C. §§1331 and 1343, and in part alleging that exhaustion of tribal court remedies was futile, given four years of tribal court inaction.

On November 22, 2002, District Judge William P. Johnson granting in part Defendants' motion to dismiss and stayed the case until June 1, 2003, to allow the Santa Ana tribal court to make a ruling. On February 28, 2003, a new Tribal Judge who had heard none of the hearings dismissed the Burrell's complaint based on sovereign immunity. District Judge William P. Johnson then issued judgment granting defendants' motion to dismiss based on res judicata and sovereign immunity.

Petitioners seeks a review of the opinion of the Tenth Circuit Court of Appeals in *Burrell v. Armijo*, No. 03-2223 (10th Cir. 7/24/06), in which the dismissal of the Santa Ana Pueblo was upheld. The Burrells do not appeal the 10th Circuit reversal of the dismissals of the individual defendant tribal officials, which allowed 42 U.S.C. §§1981 and 1985 actions to proceed against them in their individual capacities for any actions taken by them which exceeded their tribal authority.

FACTS OF THE CASE

The following factual story is based on the allegations of the Complaint, which must be accepted as true, since at issue is the Defendants' motion to dismiss based on Rule 12(b)(1). *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Part of these factual allegations are also based on materials attached to Burrells' response to the motion to dismiss.

On May 20, 1980, Bob and Susan Burrell were given a ten year lease for 171.9 acres of Santa Ana Pueblo land by a signed "Lease" with the Southern Pueblos Indian Agency of the Bureau of Indian Affairs of the Department of the Interior, designated Farm Lease No. 3210018090, a copy of said lease attached as Exhibit A to Plaintiffs' Response to Motion to Dismiss. [App. 123-132] They accepted this lease based on the promises tribal administrators were giving them that if they ran a successful farm operation like at nearby Sandia Pueblo, the lease would be renewed as long as the Burrells lived. *See* ¶1 of Affidavit of Bob Burrell [App. 113]

Bob Burrell had been a successful construction contractor in Albuquerque, New Mexico, but gave that business up to enter into said lease. The Burrells liquidated all of their assets, including a home, business assets and personal property, generating over $70,000 to use in the development of said farm. *See* [App. 109-123 and Affidavit of Bob Burrell App. 113-114] With their own funds, they bought a house trailer and moved on an old "feed lot" tract on the Pueblo of Santa Ana and installed a well, a septic tank, and power and phone lines. The field across from the mobile home had large trees and rocks, and at one time was used as a dump by the Pueblo. The Burrells cleaned

up the fields; cleared trees, rocks and refuse; plowed; built fences; dug ditches. They bought their first tractor, a 1967 International for $6500 in 1981. All the while, they integrated into the ways of the Santa Ana Pueblo people. [App. 109-123 and Affidavit of Bob Burrell App. 113-4]

The farm acreage was raw and undeveloped, and the Burrells had to remove 40-45 trees, level the property, install irrigation systems, and treat the soil with fertilizer for years in order to get the farm producing. They worked the farm for seventeen (17) years to get the farm into full production, living quietly and peacefully on the Pueblo and were gradually accepted by the people, making many friends and becoming a part of the Pueblo community. When they had trouble with cows infiltrating their field and causing damage, the Burrells were able to work it out peacefully. [App. 109-123]

On October 7, 1980, the Santa Ana Tribal Council renewed the original 10 year lease for another 10 years, based in part on the excellent work that the Burrells had done over the first 10 years of the lease. *See* ¶4 of Affidavit of Bob Burrell [App. 114], Tribal Resolution 85-R-13 [App. 129] and correspondence to the Southern Pueblos Agency [App. 130] They were repeatedly told by the Tribal officials that they would be able to stay on the farm for their entire lives. [App. 114] The Burrells bought a long horn bull and some heifers to start a small cattle operation in 1983-84, and the herd was upgraded over the years with registered stock. Some of the fields with high alkali content could not be made productive until the late 1980's, after many failures. Over the years, the Burrells obtained farm loans from the Farmers Home Administration to buy farm equipment and materials and supplies to create and run the farm, and at one time were in debt for $240,000. They

had to service the debt and generate enough income to live from the farm operations, and in the beginning years they suffered extreme hardship in order to survive. Susan Burrell survived cancer, and had to work part-time at a video store to make ends meet. [App. 109-123 and Affidavit of Bob Burrell App. 114-5]

They continuously improved the property, buying farm equipment, building storage buildings, installing water and sewer hook-ups, laser leveling much of the property, and working the soil. They paid their lease payments, water rights assessments, FHA mortgage payments, taxes, and complied with all regulations and requirements imposed on them from the Southern Pueblos Agency of the Bureau of Indian Affairs, the Santa Ana Pueblo and the Farmers Home Administration. [App. 109-123 and Affidavit of Bob Burrell App. 115] One year a forest fire in the Jemez mountains let rain run wild seed down river and into irrigation ditches and eventually onto fields down river, including the Burrells' farm, causing a loss of crop. They and many farmers along the Rio Grande had to start all over, planting, spraying, fertilizing and hoping for the best. The strain of keeping the farm productive drove Bob Burrell into a heart attack on December 26, 1993, and he requested Santa Ana Pueblo to approve moving another mobile home on the property so that his daughter and her husband could help run the farm, which request was approved by Santa Ana Tribal Council on February 1, 1994. [App. 115 and correspondence from Tribal Administrator Roy Montoya App. 131]

Tribal Officials continued to tell the Burrells that they had done a fantastic job with the farm and that they would have the farm for the rest of their lives. The Pueblo also approved another extension of the lease to the year 2003

in order for them to get FHA financing. [App. 115] The Burrells had good neighbors and not so good neighbors, and sometimes they were treated more than fair by the Pueblo officials. Other times they were discriminated against in overt and open fashion, which became worse after the casino opened. [App. 115] Defendant Leonard Armijo took the office of Governor in 1997, a year the Burrells felt was going to be an excellent crop year giving them expectations that their years of hard work were going to be finally paying off. Leonard Armijo was already Acting Chief of Police when the Pueblo could not keep a professional chief of police to stay on the job due to all the political infighting and discrimination. He fired Roy Montoya as Tribal Administrator, who had held said position since the mid-1980's. The Burrells had a long successful business relationship with Roy Montoya. *See* ¶10 of Affidavit of Bob Burrell [App. 116]

Discrimination against the Burrells took various forms. They were not allowed to drive farm equipment down paved roads or through the village, when tribal members were allowed. They were refused their requests to not allow shooting in their direction when they rode their horses down the ditch. When moving cattle they could not have more than a couple of other horseback riders helping them. When they put in a gate without prior approval, they were told that the Pueblo could take over their fields at any time. When a drunk threatened their daughter, Melonie Feldkamp, with a gun at her own mobile home, nothing was done even though the incident was reported to Leonard Armijo, who was then Acting Chief of Police of the Pueblo. Their grandchildren were picked on the school bus. Their grandson could not play on the Little League team because he was white. Clyde

Sandoval of the BIA proposed to the Tribal Council to concrete the ditches on the south side fields, but the Council refused while agreeing to do so for members of the Pueblo. [App. 109-123]; and Affidavit of Bob Burrell. *See* ¶11 [App. 117]

The Burrells paid $5000 per year to the Southern Pueblo Agency of the BIA for water rights when Pueblo's have never been required to pay water rights charges, since they purportedly had first rights to water under various treaties. *See* ¶12 of Affidavit of Bob Burrell [App. 117] Farm Administrator Jerry Kinsman told Bob Burrell that the Pueblo obtained grants from an "eastern university" to develop a blue corn business, which would include farming operations and facilities to grind blue corn meal. Though the Pueblo received these grants, they never started farming operations for the generation of blue corn in sufficient quantity to comply with their grant requirements and supply their grinding operations. The Pueblo would buy blue corn from outside sources for their business. *See* ¶13 of Affidavit of Bob Burrell [App. 117] The Burrells were not a part of said grant, or the Pueblo's blue corn business, however they decided to plant 15 acres of blue corn as part of their farming operation. Jerry Kinsman contacted the Plaintiffs and told them that they were going to be inspected under said grant, and that he had been telling the granting authorities that the Pueblo had blue corn farming operations. However, the Pueblo could not show the inspectors any blue corn fields, and he asked Bob Burrell to allow the Pueblo to show them the 15 acres he had planted, and allow the Pueblo to pretend that the fields were a part of the blue corn business. Bob Burrell believes that one of the reasons the Pueblo took his farm

was to cover the Pueblo's blue corn operation's commitments. *See* ¶14-16 of Affidavit of Bob Burrell [App. 117]

The Pueblo had also started construction of concrete irrigation ditches to feed one part of the Pueblo's farming areas used by individual Pueblo members; however, construction delays prevented the completion of the concrete ditches, and these individual Pueblo members could not irrigate their fields and therefore their livestock was put in jeopardy. *See* ¶17 of Affidavit of Bob Burrell [App. 117]

For 17 years the Burrells bailed hay at night when the moisture content is high which is standard farming practice. The difference in value between hay bailed at night verses during the day can be several dollars per bale, or the difference between a farm surviving or not. During all those 17 years they loaned equipment to their neighbors, helped members of the Pueblo plow their fields and bail hay, and were consistent good neighbors to Pueblo friends. *See* ¶18 of Affidavit of Bob Burrell [App. 117]

On June 1, 1997, Governor Leonard Armijo drove to one of Burrell's fields in his Chief of Police car and ordered Bob Burrell to no longer bail hay at night, ordering him off his tractor. Tribal members were allowed to bail at night. *See generally*, Complaint "Factual Allegations" [App. 109-123 and ¶19 of Affidavit of Bob Burrell App. 117]. *See* correspondence attached as Exhibit D [App. 133] The Burrells tried to get Lawrence Montoya as Lt. Governor to agree to some reasonable solution to the bailing problem. They had meetings with Lawrence Montoya, Lt. Governor of Santa Ana Pueblo; Nathan Tsosie, Tribal Administrator of Santa Ana Pueblo; Jerry Kinsman, Farm Administrator of Santa Ana Pueblo, and they all refused to intercede with

Armijo's orders. They were clearly working together to drive the Burrells off their farm. *See generally*, Complaint "Factual Allegations," [App. 109-123 and ¶20 of Affidavit of Bob Burrell App. 117-8]

Lt. Governor Lawrence Montoya approached Bob Burrell in early July 1997 about what it would take for the Pueblo to buy out the Burrells. Bob offered $500,000, and was told that nothing could be done until after Feast Day on July 26, 1997. On July 20, 1997, Lt. Governor Lawrence Montoya called Burrell and told them to "sell their cows", which had grown to a herd of 50 mother cows, 50 calves and one bull. On or about July 24, 1997, the Santa Ana Tribal Council met and voted to buy out the Burrell lease for $500,000. The Burrells were even told by a tribal member that the vote was 47-2, and he described what went on in the meeting. The Burrells have kept the names of the tribal members who were talking to them hidden for fear of retaliation against them. *See generally*, Complaint "Factual Allegations," [App. 109-123 and ¶¶21-23 of Affidavit of Bob Burrell App. 118]

Tribal Administrators in council meetings and in person have vehemently ordered tribal members not to talk to the Burrells, and specifically ordered them to not discuss anything about the council meeting held in July which these tribal administrators now deny ever occurred. These tribal administrators are acting in conspiracy to cover up the first tribal council resolution to buy the Burrell farm, using threats against their own people. One tribal member that these tribal administrators thought was talking to the Burrells has even been jailed. *See generally*, Complaint "Factual Allegations," [App. 109-123 and ¶¶24-25 of Affidavit of Bob Burrell App. 118]

Farm Administrator Jerry Kinsman ordered the tribal farm crews to take over the Burrell farm completely in mid-July 1997. On August 15, 1997, the individual defendants acting in concert hired someone in Bernalillo to take bailers to the Burrells' fields and harvest the crop. These tribal officials then distributed part of said crop to various members of the Pueblo who had not been able to grow any hay on their fields because of construction delays in finishing the construction of concrete irrigation ditches to the tribal members' fields. The Burrells crop was taken without their permission or authority, and amounts to felony larceny against them by the Governor and Acting Chief of Police of Santa Ana Pueblo, and his Lt. Governor, Farm Administrator and Tribal Administrator. *See generally*, Complaint "Factual Allegations," [App. 109-123 and ¶¶26-27 of Affidavit of Bob Burrell App. 118-9]

The farm crew did part of the bailing of the Burrell fields prior to 7 a.m. in violation of the Governor's own bailing restrictions. *See* ¶28 of Affidavit of Bob Burrell. *See generally*, Complaint "Factual Allegations," [App. 109-123 and ¶¶26-27 of Affidavit of Bob Burrell App. 119] Lawrence Armijo, Governor and Acting Chief of Police of Santa Ana Pueblo; Lawrence Montoya, Lt. Governor; Jerry Kinsman, Farm Administrator; and Nathan Tsosie, Tribal Administrator, acting individually and in concert, refused to comply with the Tribal Council resolution to buy the Burrell farm for $500,000, and proceeded to "negotiate" with the Burrells to accept less money. These tribal officials had no authority to refuse to put into effect a resolution of the Tribal Council, as under their tribal traditions, the tribal council is superior in authority to the Governor, the Chief of Police, the Tribal Administrator or the Tribal Farm Administrator. *See generally*, Complaint "Factual

Allegations," [App. 109-123 and ¶¶29-30 of Affidavit of Bob Burrell App. 119]

On August 25, 1997, the Burrells removed their two mobile homes and removed all of their farm equipment. Nathan Tsosie and Lawrence Montoya arranged to have Clyde Sandoval and Randy Buller of the BIA inspect the farms to determine if the Burrells had violated any provisions of the lease, and regulations of the BIA or accepted farming practices. The BIA officials stated that there were no violations, and fully supported the Burrells. As late as early December 1997, BIA officials were still being contacted by tribal officials to get support for allegations that the Burrells violated some law or regulation, and the Burrells were refused assistance from said governmental employees. *See generally*, Complaint "Factual Allegations," [App. 109-123 and ¶¶31-32 of Affidavit of Bob Burrell App. 119-120]

On August 29, 1997, Lawrence Montoya, Leonard Armijo, Nathan Tsosie and Pueblo attorney Bill Haltom met with Bob Burrell and offered: $218,000 for the FHA loan payoff; a 3 year health insurance for the Burrells; the Pueblo would buy a home lot off of the pueblo to set up their mobile home; and to hire Bob as "Farm Manager" for the Pueblo. That offer was taken away by these tribal officials on September 23, 1997. *See generally*, Complaint "Factual Allegations," [App. 109-123 and ¶33 of Affidavit of Bob Burrell App. 120]

On September 25, 1997, the Tribal Council voted to reinstate the withdrawn offer. *See* attached Exhibit E [App. 134-5] On October 2, 1997, the Burrells demanded "copies of any recording and/or transcript of any Tribal Council meeting" dealing with the matter, to include any

"Tribal Council resolutions or documents created pursuant to Tribal Council Action, material filed as exhibits, written communications to the Council, and other evidence for the record." The information was sought to "see if there is any possibility of avoiding litigation." *See generally*, Complaint "Factual Allegations," [App. 109-123 and ¶¶34-35 of Affidavit of Bob Burrell App. 120] Exhibit F [App. 136-7] Mr. Bill Haltom, Esq., replied in writing that no record is kept of Tribal Council meetings, no minutes are kept, no written resolution generated, and no evidence existed. He also demanded that a thorough investigation be conducted before filing a lawsuit, otherwise he would seek Rule 11 sanctions against Burrell's attorney. *See* Exhibit G [App. 138-9] The Burrells hired a retired FBI agent experienced with criminal investigations on Indian reservations to conduct an investigation, and he reported that no tribal official would talk to him per the orders of Mr. Bill Haltom. *See* ¶¶36-37 of Affidavit of Bob Burrell [App. 120]. After the Burrells hired an attorney, who alleged that the Tribal officials committed felony larceny, some of the bales of hay that had been removed were replaced presumably under the orders of these defendant tribal officials. *See* ¶38 of Affidavit of Bob Burrell [App. 120-1]

Since taking the Burrell farm, Defendant tribal officials or their agents have communicated with the BIA and its employees giving false information, including but not limited to:

a) that the Burrells were abandoning their farm;

b) that the Burrells were bankrupted and could not make their lease payments;

c) that the Burrells were in default under the FHA mortgage;

d) that the Burrells had not paid their water rights assessments;

e) that the Burrells violated their lease, violated some BIA farming regulations, or violated some provision of the FHA mortgage. *See* ¶39 of Affidavit of Bob Burrell [App. 121]

Bob Burrell absolutely denied that he ever told any tribal official that he was in foreclosure with his FHA mortgage, or that he was abandoning his lease. Bob Burrell states that they were doing well with the farm, and expecting to have their best year, since all of the fields were finally in full production, and they were having a very successful breeding program with their cattle operation. *See* ¶40 of Affidavit of Bob Burrell [App. 121] During the weekend of April 4, 1998, tribal member Otis Leon took approximately 1500 bales of Burrell's hay, which is another felony crime committed against the Burrells by tribal members. *See* ¶41 of Affidavit of Bob Burrell [App. 121]

Burrell has been told that he and his family should not even step a foot on the Pueblo, given the emotional atmosphere. His wife and he have fear that something could happen that would harm them if they ever attempted to continue to work this farm, though the Pueblo defendants posture as if the Burrells can return at any time. *See* ¶¶42-43 of Affidavit of Bob Burrell [App. 121-2]

Bob Burrell testifies that at no time did he want to abandon this farm. His family and he were systematically

driven off this farm by these tribal administrators. *See* ¶44 of Affidavit of Bob Burrell [App. 122]

These defendant tribal officials were clothed under tribal authority at all times, and they intentionally and maliciously ran the Burrells off their farm, stole their crop and terminated their lease, which actions were based on discrimination against the Burrells because of their race. [App. 122] These tribal officials had duties under their titles of Acting Chief of Police, Governor, Lt. Governor, Farm Administrator and Tribal Administrator to protect the Burrells' property, and to protect them from criminal activities against their home and property. These officials intentionally refused said protections because the Burrells are white and non-Indian. [App. 122]

The Pueblo of Santa Ana has no constitution, and no common law system, and no clearly written statutory or regulatory system governing its administrative officers and government of the Pueblo of Santa Ana. The Pueblo of Santa Ana presently has a governmental system which was imposed on it by Spanish Conquistadors which involve a life appointment of a "Cacique." The historical and aboriginal governing organization of the Pueblo of Santa Ana, and its aboriginal religious traditions, did not revolve around the power of a Cacique who had an appointment for life. The present Cacique system at the Pueblo of Santa Ana involves the appointment for life of a member of the Pueblo who has his powers until voluntary retirement, or by his appointment of his own successor. The present Cacique Juan Montoya, was appointed by the previous cacique, his uncle, when he was only 16 years old. [*See* ¶¶48-52 of the Complaint, App. 109-123]

The Pueblo of Santa Ana does not elect its Governor, Lt. Governor, Chief of Police or other government officials, which are all appointed by the Cacique on an annual basis. No tribal member has the right to vote in general elections of tribal officials. The Tribal Council of the Pueblo of Santa Ana includes all male members of the Pueblo at least the age of 18 years, who have served in some function for the tribe. Women are not allowed to be members of the Tribal Council, and are not even allowed to attend Tribal Council meetings. The present Cacique is a part of a small group of people who have taken governmental control of the Pueblo of Santa Ana, and total control of all of the operations of the Santa Ana Casino, and other businesses, including the profits derived therefrom. The Pueblo of Santa Ana has made hundreds of millions of dollars from the profits it has received from its operation of its Casino over the last ten years, which a very high percentage derived during the time when the operation of the casino was ruled by the New Mexico Supreme Court to have been illegal. [*See* ¶¶54-58 of the Complaint, App. 109-123]

The Tribal Council has little input into daily government, the casino or other businesses, and the agenda of the Tribal Council is created by the Governor, who also schedules its meetings. The individuals who are controlling the Cacique and his appointment of government officials have themselves benefitted by an accumulation of interests on the Pueblo, employment for themselves and their family members, and control over many governmental functions at the Pueblo of Santa Ana. Women are denied basic constitutional rights at the Pueblo of Santa Ana concerning the many restrictions imposed on them, including but not limited to, their inability to vote for

government officials, their inability to have input about potential changes in government, their inability to attend Tribal Council meetings or vote in Tribal Council meetings, and their inability to have any input into the appointment of the Cacique, or his appointments of various governmental officials. [*See* ¶¶59-63 of the Complaint, App. 109-123]

The general environment of sex discrimination which exists at the Pueblo of Santa Ana has been reflected in many bizarre orders of previous Governors. One instance the Governor ordered that any woman who was living with a man who was not named, was to immediately become named or they would have to move off the Pueblo. This order was rescinded by a subsequent governor who did not want his daughter marrying her live-in boyfriend. The women are also denied their basic First Amendment rights to assemble and petition the tribal government about their grievances, and of the right of free speech, in that any attempt on their part to vocally express dissent about the governmental system and their place in it results in direct threats of banishment from the tribe, which would result in their losing what housing they have on the reservation, and being banished from their membership in the Pueblo of Santa Ana. [*See* ¶¶64-65 of the Complaint, App. 109-123]

Any male member of the Pueblo of Santa Ana who voices dissent of the governmental systems and policies at the Pueblo of Santa Ana are also threatened with banishment, and there are at least four instances in recent years in which members have literally been driven from the Pueblo for voicing any kind of dissent against the power of the Cacique and his inner circle. Said system of government amounts to a totalitarian state and has resulted in

the political and financial oppression of the members of the Pueblo of Santa Ana by a corrupt system of government. This corrupt system of government is the underlying cause of the violations of the constitutional rights of Bob and Susan Burrell in the underlying case. [*See* ¶¶67-8 of the Complaint, App. 109-123]

The tribal officials have ordered all pueblo members to have no communication with the Burrells, and threatened them not to provide evidence as witnesses on behalf of the Burrells. [*See* ¶69 of the Complaint, App. 109-123]

On April 14, 1998, the Burrells filed an action in the United States District Court for the District of New Mexico, styled *Burrell v. Leonard Armijo, et al.*, CIV 98-0438 JC/WWD. After consideration of various motions to dismiss filed by the Defendants, on September 2, 1998, Judge John E. Conway dismissed the complaint without prejudice for failure to exhaust tribal court remedies.

On October 29, 1998, the Burrells filed a Complaint for Damages in the Tribal Court of Santa Ana. [App. 254] The tribal court judge did not allow discovery, as interrogatories and requests to produce were served on each defendant, including the Pueblo of Santa Ana. *See generally*, one set of Interrogatories [App. 274] and Requests to Produce [App. 301] served on one defendant, though each of the individual defendants received similar sets when served with the summons and complaint. The Burrells also filed several motions for injunctive relief [App. 310] and for protective orders [App. 354], alleging that defendants in their official capacities were threatening and harassing potential witnesses, some of whom had expressed willingness to testify about the tribal council resolution ordering a settlement with the Burrells which

tribal officials were ignoring. The Burrells finally got a hearing on the pending motions, but the tribal judge gave them only four days notice, which prompted a motion for continuance. [App. 354] On February 29 and March 21, 2000, Judge Kezele held evidentiary hearings on Defendants' Motion to Dismiss on grounds of tribal sovereign immunity and failure to state a claim. [App. 359] Both parties asked for copies of the tapes and records of several hearings, but no response came back from the Tribal Court. [App. 359] No ruling had ever been received by Judge Kezele, and it is obvious that he was never going to make a ruling and simply allow the case and pending motions to lie unresolved. [*See* ¶¶74-85 of the Complaint, App. 109-123]

The long delay and obvious intentional failure to act on the case, prompted the Burrells to re-file in the U.S. District Court alleging in their new complaint that they had exhausted tribal court remedies. Defendants filed a motion to stay discovery which was granted by the lower court. [App. 83] Defendants filed another motion to dismiss [App. 29], and the lower court granted it in part, staying the federal case and remanding to the tribal court to have the newly appointed Tribal Judge Angela Lujan make rulings in the tribal case. [App. 158] Burrells immediately filed motions to amend their complaint, for an order requiring discovery (particularly concerning the issue of a tribal council resolution requiring a settlement with the Burrells that was being ignored by tribal officials, exposing clear separation of tribal powers issues), for arbitration and/or for a jury trial setting. [App. 361] These motions were ignored by the tribal judge who issued her order dismissing the case. [App. 168]

After notice of the tribal court decision, the Plaintiffs' filed a "Motion to Exercise Jurisdiction Over This Case;

For an Order That the Tribal Court's Ruling Based on Sovereign Immunity is Null and Void and for the Court to Order a Jury Trial" and a motion to consolidate the records of the first federal Burrell lawsuit and the tribal court records with the instant case for purposes of having a complete record. [App. 169, 188] The lower court denied the motion to consolidate the records [App. 193] and an order denying the motion to exercise jurisdiction over the case, wherein he ordered "status briefs" from the parties. The Burrells included as exhibits to their "Status Brief" parts of the record proper from both the first Burrell federal case, and the tribal court case. [App. 226-396]

The lower court issued an "Order Lifting Stay, Denying Plaintiffs' Motion and Notice of Pending Motions" and on August 29, 2003, granted the defendants' motion to dismiss and issuing Judgment in favor of defendants.

ARGUMENT

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), the U.S. Supreme Court, with a majority opinion written by Justice Marshall, ruled that the Indian Civil Rights Act of 1968, 25 U.S.C. §1301, et seq., does not provide a private right of action. Petitioners pray that this Court overrule this finding, and hold that the Indian Civil Rights Act provides an implied private right of action giving anyone who has had their constitutional rights violated by an Indian tribe on their reservations the right to sue for damages and injunctive relief, in addition to the right of habeas corpus provided in 25 U.S.C. §1303.

The relevant portions of the Indian Civil Rights Act to the Burrell claims are:

> "No Indian tribe in exercising powers of self-government shall –
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> . . . .
>
> (5) take any private property for a public use without just compensation;
>
> . . . .
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. . . ."

On the face of the statute, the Burrells are entitled to the protections of these prohibitions, in addition to the same provisions of the U.S. Constitution:

> "**Amendment I.** Religion and Expression
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> **Amendment V.** Rights of Persons
>
> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation.

Amendment VII. Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Tenth Circuit opinion in this case allowed 42 U.S.C. §1981 and 1985 counts to proceed against these individual Tribal officials, but upheld the dismissal of the Pueblo of Santa Ana relying on tribal sovereign immunity. The Burrells ask this Court to consider whether such tribal sovereign immunity should be set aside.

The general rule of stare decisis is not an absolute rule, and this Court recognizes the need on occasion to correct what are perceived as erroneous decisions or to adapt to changed circumstances. Stare decisis is not a constitutional command; as Justice Frankfurter wrote,

"stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision." *See Helvering v. Hallock*, 309 U.S. 109, 119 (1940). In some instances it becomes important to the Court to correct an earlier interpretation that it views as erroneous or no longer viable.

This Court is less reluctant to overrule a decision that involves constitutional interpretation rather than interpretation of a statute.

> "[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-7 (1932) (Justice Brandeis dissenting).

Stare decisis "has only a limited application in the field of constitutional law." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1938) (Justices Stone and Cardozo concurring). "Our willingness to reconsider our earlier decisions has been particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996). When considering to overrule a constitutional precedent, the Court usually looks for something in addition to its belief that a case was wrongly decided. "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). The

Burrells submit to this Court that "special justification" exists to overrule *Santa Clara Pueblo v. Martinez* and its grant of sovereign immunity to the Pueblo of Santa Ana and its finding that the Indian Civil Rights Act of 1968 does not have an implied right of action.

The *Martinez* court held that the act did not have a remedial provision, other than a writ of habeas corpus, and since there was no explicit waiver of sovereign immunity, the tribe still enjoyed immunity from suit against it based on the Indian Civil Rights Act. However, *Martinez* specifically held that individual officers of the Pueblo were not protected by the tribe's immunity from suit. Id. at 115-6. *See also, Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165, at 171, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977); *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Tribal sovereign immunity does not bar suit for prospective relief against tribal officers acting in violation of federal law. *Burlington Northern v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991). When tribal officials act beyond their authority, they lose their entitlement to immunity from suit. *Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269 (9th Cir. 1991).

Federal contracts and lease regulations typically require no discrimination on the basis of race, religion, color or sex. A contractual relationship between a tribe and state actors, can create the color of state law requirement of 42 U.S.C. §1983. In *Evan v. McKay*, 869 F.2d 1341, at 1347-9 (C.A.9,1989), the Ninth Circuit found state action on the part of Blackfeet Tribal police officers because they had a contract with the City of Browning. In the instant case, the Burrells tried to get discovery about the duties of

the Santa Ana Tribal Police (Governor Armijo was governor and acting Chief of Police), and there could have been grants of money from the state towards the tribe's police force, which could have made Armijo acting under color of state law, however discovery was never permitted in either the two federal cases, or in the tribal court case.

In *Nevada v. Hicks*, 533 U.S. 353 (2001), this Court recently held that tribal courts had no jurisdiction over the §1983 claims, since they are not courts of "general jurisdiction." The historical and constitutional assumption of concurrent state-court jurisdiction over cases involving federal statutes is missing with respect to tribal courts, and their inherent adjudicative jurisdiction over nonmembers is at most only as broad as their legislative jurisdiction. Congress has not purported to grant tribal courts jurisdiction over §1983 claims, and such jurisdiction would create serious anomalies under 28 U.S.C. §1441. Obviously, tribal courts would also not have jurisdiction over 42 U.S.C. §1981 and §1985 claims.

Part of the underlying justification for the *Martinez* court not allowing 42 U.S.C. §1981, §1983 and §1985 claims, or implied rights of action under the Indian Civil Rights Act of 1968, is that the Indian tribes could resolve their own disputes, presumably thinking that constitutional violations could be heard in their own tribal courts. Also, the *Martinez* court pointed to the tribal courts as available forums for litigating violations of the Indian Civil Rights Act. *See Martinez* at 436 U.S. at 64. Now the *Hicks* case shows that tribal courts have no jurisdiction over federal constitutional tort claims. Anyone familiar with practice before tribal courts will attest that they routinely rely on sovereign immunity to avoid claims of violations of the Indian Civil Rights Act, as was done in

the instant case. As the *Hicks* case recognized, tribal courts do not have jurisdiction over federal claims, since they are not courts of general jurisdiction. The practical realities are that tribal courts not only do not have jurisdiction over constitutional tort violations, or over violations of federal statutes like the Indian Civil Rights Act, but they are inadequate forums to address violations of constitutional rights, given the realities of tribal political powers and their relations to tribal court systems.

So the present state of affairs is that Indians and non-Indians have no defensible constitutional rights while they are on Indian reservations, as tribal and federal courts are unavailable to them, except when tribal officials go beyond their tribal authorities, which in the instant case forces scrutiny into a tribe's constitution, if it has one, and its historical and cultural history. The latter seems inappropriate as a determining factor in constitutional torts. The *Martinez* case involved tribal membership, which the *Martinez* court regarded as inherently a matter for the tribes to resolve, despite the obvious sex discrimination involved in the Santa Clara Pueblo's membership restrictions. In the instant case, Santa Ana Pueblo through its non-elected officials, stole private property, violated the equal protection and due process rights of the Burrells, and took their real property rights using police powers, instead of some legitimate use of their powers of eminent domain.

Accepting the complaint's allegations as true, these tribal officials then ignored resolutions of the Tribal Council of the Pueblo of Santa Ana to settle with the Burrells. This brings to focus that the Pueblo of Santa Ana has no elected officials. Tribal members have no right to vote, which is a seemingly preposterous situation in the modern United States, who is willing to spend billions of

dollars in Iraq to establish democracy by trying to establish the right to vote in totalitarian Muslim countries. Yet right here in America, U.S. citizens/tribal members of the Pueblo of Santa Ana, and other tribes, have no right to vote. Are our first Americans less than human, or so different culturally, that they can be denied basic constitutional rights contained in the Bill of Rights?

Tribal sovereign immunity against constitutional torts has created totalitarian and corrupt governments on Indian reservations within our own country. American Indians have left a history of honorable service and dedication in Armed Services, and have spilled their blood to defend this country, yet it can be argued that they have no constitutional rights within their own reservations. American Indians and non-Indians who live and work on Indian reservations should not have their defensible constitutional rights stripped from them. To blindly say that this is a matter for Congress to enact specific waivers of sovereign immunity, like attaching a private right of action to the Indian Civil Rights Act, is ignoring political reality – that will never occur, as shown by efforts over the past 20 years to address this horrible situation.

This Court has expressed reluctance to expose poor Indian tribes to lawsuits. However, this Indian tribe is far from poor, as it has made gigantic amounts of money with its casino, and has extensive commercial enterprises. The Burrells propose that a lifting of sovereign immunity against this particular tribe could still leave open the possibility that other Indian tribes, who are not rich, could still have sovereign immunity issues addressed on a case by case basis.

The American Indian is still struggling with assimilation into the general American society. Substance abuse and poverty and a host of other societal ills inflict them

and create an environment which robs them of individual empowerment. The fact that they have no judicial forums to address violations of their most basic rights is a very big factor in keeping them down. Can their own tribal government deny them the right to vote? How about the right to an independent judiciary imposing an orderly rule of law? How about the right to a trial by jury? How about the rights of women to have a voice in their Tribal Council, or even the right to attend meetings? How about the right to have a constitution, or to have the traditional powers of the tribal council to be paramount over tribal officials?

Can the legal system outside the reservation stand by while such outrageous insults against core values of the American way of life occur? The Burrells humbly submit that is what has occurred during the last 40 years of history after enactment of the Indian Civil Rights Act of 1968. The *Martinez* case resulted in a sexist and racist decision that can rank with *Plessy v. Ferguson*, 163 U.S. 537 (1896), which approved de jure racial segregation in public facilities, and ruled that states could prohibit the use of public facilities by African Americans.

The American Indian and non-Indians on reservations are still U.S. citizens first and foremost, and no set of circumstances can justify them being robbed of their individual constitutional rights. If the Indian people are going to rise above poverty, lack of self-determination and the plethora of societal ills on the reservations, it will ultimately have to come from the people themselves, not their tribal governments. Such efforts on the part of a people must start with them having the ability to determine who shall represent them in tribal government, and a legal system that can hold tribal government and its officials accountable for violations of fundamental constitutional rights. Their lack of enforceable individual constitutional rights has made a

direct contribution to all the ills on Indian reservations. Indian sovereign immunity from constitutional torts has stripped the individual Indian of the basic dignity which is an inherent right of all American citizens.

CONCLUSION

The Burrells ask this Court to grant a writ of certiorari, and seeks to overturn the following rulings of the 10th Circuit Court:

1) The dismissal of the Pueblo of Santa Ana as a party defendant.

2) Avoiding the *Martinez* case, which the Burrells request to be specifically overturned regarding the Pueblo's sovereign immunity and its holding that no private right of action exists in the Indian Civil Rights Act of 1968.

3) Reinstating the Burrells' 42 U.S.C. §1983 action until discovery can be completed to determine if the Pueblo had ever received state or federal funds for its police force which would make the defendant Acting Chief of Police and Governor Leonard Armijo a state actor.

4) Allowing the same claims under 42 U.S.C. §§1981 and 1985 that the Tenth Circuit Court has allowed against the individual tribal officials to be available against the Pueblo of Santa Ana itself.

Respectfully submitted,

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456 F.3d 1159

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BOB BURRELL and
SUSAN BURRELL,

Plaintiffs-Appellants,

v.

LEONARD ARMIJO, Governor of Santa Ana Pueblo and Acting Chief of Santa Ana Tribal Police; LAWRENCE MONTOYA, Lt. Governor of Santa Ana Pueblo; NATHAN TSOSIE, Tribal Administrator of Santa Ana Pueblo; JERRY KINSMAN, Farm Administrator of Santa Ana Pueblo; SANTA ANA PUEBLO,

Defendants-Appellees.

No. 03-2223

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. No. CIV 02-542 WJ/DJS)

Chris Lucero, Jr., Albuquerque, New Mexico, for plaintiffs-appellants.

Richard W. Hughes (Caren I. Friedman, with him on the brief), Rothstein, Donatelli, Hughes, Dahlstrom & Schoenburg, LLP, Santa Fe, New Mexico, for defendants-appellees.

Before **BRISCOE**, **McWILLIAMS**, and **McCONNELL**, Circuit Judges.

(Filed July 24, 2006)

BRISCOE, Circuit Judge.

Bob and Susan Burrell ("the Burrells") filed this action against the Santa Ana Pueblo ("the Pueblo"), a federally recognized Indian tribe; Leonard Armijo, Governor of the Pueblo; Lawrence Montoya, Lieutenant Governor of the Pueblo; Nathan Tsosie, Tribal Administrator of the Pueblo; and Jerry Kinsman, Farm Administrator of the Pueblo, for violations of their civil rights pursuant to 42 U.S.C. §§ 1981, 1983, and 1985, as well as claims for breach of a federal farm lease and "respondeat superior." The district court initially stayed the case so that the Burrells could exhaust their tribal court remedies. After the Santa Ana Pueblo Tribal Court ruled that the Pueblo and the named tribal officials were entitled to sovereign immunity, the district court ruled that the tribal court's decision was entitled to preclusive effect and dismissed the Burrells' case. The Burrells now appeal. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we hold that the district should not have given preclusive effect or otherwise recognized the tribal court's ruling, and therefore reverse and remand the case for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND[1]

In May 1980, the Burrells entered into a ten-year farming lease with the Pueblo for approximately 172 acres of the Pueblo's land.[2] According to the Burrells, they were informed that if they conducted a successful farming operation, the lease would be renewed for as long as they lived. As a result, the Burrells obtained farm loans from the Farmer's Home Administration ("FHA") and invested their personal assets in order to purchase equipment and other materials necessary to run a farm. In February 1985, the Tribal Council of the Pueblo (the "tribal council") extended the lease until September 2000 so that the Burrells could refinance their FHA loans.

The Burrells integrated themselves into the ways of the Pueblo and, in their own words, were "sometimes" treated "more than fair" by Pueblo officials. The Burrells assert, however, that over the years Pueblo officials subjected them to various forms of discrimination. *See* App. at 12-13. For example, the Burrells claim that Pueblo officials prohibited them from driving their farm equipment along paved roads, prevented them from using more than a couple of horseback riders to move their cattle, and refused to permit construction of concrete ditches in their fields – all while allowing tribal members these privileges.

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[1] The following facts are taken from the Burrells' complaint. We assume the truth of these facts for purposes of this appeal.

[2] At oral argument, counsel for the Pueblo stated that although the United States Department of Interior possessed authority over the lease, the Pueblo's consent to the lease was necessary. Furthermore, counsel noted that the Pueblo could not unilaterally terminate the lease, but was required to contact the United States Department of Interior to initiate such proceedings.

The Burrells allege that the discrimination against them worsened in early 1997 when acting Chief of Police Leonard Armijo became Governor of the Pueblo. In June 1997, Governor Armijo allegedly ordered them to quit bailing hay at night, even though tribal members were permitted to do so. Moreover, the Burrells maintain that other Pueblo officials, including Lieutenant Governor Lawrence Montoya, Tribal Administrator Nathan Tsosie, and Farm Administrator Jerry Kinsman, refused to interfere with Governor Armijo's order and worked with him to drive them off their farm. App. at 14.

In July 1997, Lieutenant Governor Montoya inquired as to what amount the Burrells would accept from the Pueblo to buy out the farm lease. The Burrells proposed $500,000. On July 24, the Burrells contend that the tribal council voted to buy out the lease for $500,000 and that a tribal member informed them that the vote was 47-2. That same month, the Burrells allege that Farm Administrator Kinsman ordered tribal farm crews to take over their farm.

The Burrells assert that Governor Armijo, Lieutenant Governor Montoya, Tribal Administrator Tsosie, and Farm Administrator Kinsman (hereinafter "the individual tribal officials") refused to comply with the tribal council's resolution to buy out the Burrells for $500,000. Instead, they proceeded to negotiate for less money. The Burrells allege that the individual tribal officials lacked the authority to refuse to put into effect the tribal council's resolution.

On August 15, 1997, the individual tribal officials allegedly hired others to bale the Burrells' hay crop and then distributed part of the crop to Pueblo members. The

Burrells claim that this conduct amounted to larceny. On August 25, the Burrells removed their two mobile homes and all of their farm equipment from the leased land. A few days later, the individual tribal officials and their attorney met with the Burrells and offered them the following package: $218,000 to pay off their FHA loan; three years of health insurance; a home lot off of the Pueblo for the mobile homes; and to hire Mr. Burrell as farm manager for the Pueblo. The Burrells contend that the individual tribal officials withdrew the offer on September 23, but that the tribal council voted to reinstate the offer on September 25. In October 1997, the Burrells, through their attorney, demanded all tribal council records dealing with their farm lease to "see if there [was] any possibility of avoiding litigation." By January 1998, the tribal council had passed a resolution rescinding the September 1997 offer to the Burrells.

It is the Burrells' position that the individual tribal officials intentionally ran them off their farm, stole their crops, terminated their lease, and discriminated against them on account of their race (non-Indian). Aplt. Br. at 13.

II. PROCEDURAL HISTORY

A. Administrative Proceedings Before the Bureau of Indian Affairs, United States Department of Interior

The Burrells' complaint asserts that beginning in 1997, the Pueblo officials falsely informed the Bureau of Indian Affairs ("BIA") that they abandoned their farm, violated their lease, and defaulted on their FHA loan and water rights assessments. App. at 17.

A tribal council resolution dated October 1, 1998, stated that the Burrells abandoned their lease in the summer of 1997 and requested that the BIA institute proceedings to terminate the farm lease. *Id.* at 41. A letter dated February 11, 1999, from the Superintendent of the Southern Pueblos Agency, BIA, United States Department of Interior, notified the Burrells that the farm lease was cancelled. *Id.* at 43-44. The Superintendent cited the Burrells' failure to keep their performance bond up to date, the tribal council's October 1998 resolution, and delinquent operations and maintenance charges as reasons for the decision. The Superintendent also noted the Burrells' failure to respond to the office's prior requests for information. *Id.*

The Burrells appealed that decision to the Albuquerque Area Office, BIA, United States Department of Interior. On May 26, 1999, the Area Director affirmed the Superintendent's decision to cancel the lease. *Id.* at 45. In particular, the Area Director observed that the Burrells sent a letter dated June 22, 1998, to the Superintendent, complaining that discrimination from Pueblo officials amounted to a constructive termination and breach of the lease. *Id.* at 48. That June 1998 letter stated, in relevant part: "[The Burrells] did not voluntarily abandon their lease, but instead were illegally driven off their lands which they worked peacefully for 17 years, all because of the prejudice of a few tribal officials. The imposition of a performance bond under these circumstances is not proper." *Id.* at 53. Additionally, the Area Director stated that the Burrells did not dispute the violations cited by the Superintendent, but that the Burrells' attorney advised the office that it faced federal litigation if it continued to refuse to enforce the Burrells' contractual and

constitutional rights. *Id.* at 48. The Area Director concluded that the Burrells' claims failed to excuse their multiple breaches under the lease. *Id.* at 49.

The Burrells appealed the Area Director's decision to the Interior Board of Indian Appeals ("IBIA"), United States Department of Interior. The IBIA affirmed the Area Director's decision on May 17, 2000. *Id.* at 52. The IBIA held that the BIA did not have a trust duty toward the Burrells, rejecting the Burrells' argument that the lease violations should be excused because of the BIA's failure to investigate their allegations against the Pueblo. *Id.* at 55. Specifically, the IBIA determined that the Burrells reported the allegations of discrimination to the BIA long after they were in violation of the lease. *Id.* Therefore, the IBIA concluded that the BIA's failure to investigate those allegations was not the cause of the Burrells' lease violations. *Id.*

The Burrells did not seek federal court review of the IBIA's decision.

B. Federal Court and Tribal Court Proceedings

On April 14, 1998, the Burrells filed an action in the United States District Court for the District of New Mexico, *Burrell v. Armijo, et al.*, CIV 98-0438 JC/WWD, alleging civil rights claims under 42 U.S.C. §§ 1981, 1983, and 1985, as well as a separate count based on "respondeat superior," against the Pueblo and the individual tribal officials. App. at 21, 226-45. The district court dismissed that action without prejudice because of the Burrells' failure to exhaust tribal court remedies, following the Supreme Court's decisions in *National Farmers Union Insurance Companies v. Crow Tribe,* 471 U.S. 845 (1985)

and *Iowa Mutual Insurance Company v. LaPlante,* 480 U.S. 9 (1987). *Id.* at 21, 246-52. In particular, the district court rejected the Burrells' contentions that the exhaustion rule did not apply because the tribal court lacked jurisdiction over their BIA lease and civil rights claims. *Id.* at 250. The district court found that the Burrells' complaint could not be construed to claim a remedy under the provisions of the BIA lease, and that the Burrells failed to "cite any express jurisdictional prohibitions which prevent tribal courts from hearing their civil rights claims." *Id.* The Burrells did not appeal that decision.

On October 29, 1998, the Burrells re-filed their lawsuit in the Santa Ana Tribal Court (hereinafter "tribal court").[3] In that action, the Pueblo and the individual tribal officials filed a motion to dismiss on the grounds of tribal sovereign immunity and failure to state a claim. Meanwhile, the Burrells filed several motions, including motions to compel discovery, a motion for an evidentiary hearing, and a motion for a temporary restraining order and/or a preliminary injunction to prevent tribal officials from harassing tribal members who provided assistance to the Burrells. Tribal Judge Floyd J. Kezele held two evidentiary hearings on all pending matters on February 29, 2000, and March 21, 2000. App. at 23. By May 2002, Judge Kezele had not issued any decisions on the pending motions.

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[3] The tribal court complaint is essentially the same complaint filed in the Burrells' first federal action. The tribal court complaint contained civil rights claims under 42 U.S.C. §§ 1981, 1983, and 1985, and claims for breach of lease, respondeat superior, negligence, and violations of property rights and "tribal laws and tradition." App. at 254-73.

On May 14, 2002, the Burrells filed the present action in the United States District Court for the District of New Mexico.[4] The complaint alleged that exhaustion of tribal court remedies should not be required because Judge Kezele denied the Burrells due process of law by failing to make any rulings on the pending motions for almost four years. App. at 22-23. The complaint also asserted that Judge Kezele's conduct "exhibited extreme bias in favor of the Pueblo of Santa Ana and [the] tribal officials" who paid his salary. *Id.*

The Pueblo and the individual tribal officials subsequently filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6). In this motion, they asserted that the Burrells' complaint should be dismissed for failure to state a claim and for failure to exhaust tribal court remedies, and that the action against the Pueblo was barred by tribal sovereign immunity. App. at 29, 57. The district court granted the motion on the exhaustion of remedies ground. *Id.* at 158-65. The district court stated that at some point a delay in tribal court proceedings might be sufficient to invoke an exception to the exhaustion requirement, but given the appointment of a new tribal judge to the Burrells' case, the district court concluded that the tribal court remained an available forum for the Burrells to exhaust their remedies. *Id.* at 163-64. Thus, the district court stayed the case for six months to provide the tribal court an opportunity to address the Burrells'

[4] The Burrells acknowledge that the complaint in this action is basically the same complaint filed in the first federal action and in the tribal court. App. at 21, 189. In fact, the Burrells state that the two federal proceedings and the tribal court proceeding "involve the same parties, the same issues of fact and law, and are actually the same case." *Id.* at 189.

claims. *Id.* at 164. The district court declined to address tribal sovereign immunity until the issue of exhaustion had been resolved. *Id.*

Within that six month period, Tribal Court Judge Angela Luhan issued an "Order Granting Defendant's [sic] Motion to Dismiss on Grounds of Sovereign Immunity." App. at 168. The order stated in its entirety:

> THIS MATTER comes before the Court pursuant to Defendant's [sic] Motion to Dismiss [o]n Grounds of Sovereign Immunity. Having reviewed the entire file in this matter, submissions of the parties, applicable law, and being otherwise fully advised on the issues, THE COURT FINDS that Santa Ana Tribal Court has Jurisdiction to hear this matter, and Defendant's [sic] motion is well taken and granted, and there is no need for any further hearings in this matter.
>
> IT IS THEREFORE ORDERED that Defendant's [sic] Motion to Dismiss is hereby GRANTED on the grounds that Plaintiff's [sic] claims are barred by the Sovereign Immunity of Defendant, Pueblo of Santa Ana, from suit.

Id. Judge Luhan did not issue a ruling on any other motions.[5]

After the Pueblo and the individual tribal officials notified the district court of the tribal court's decision, the Burrells filed a motion asking the district court to declare the tribal court's decision "null and void." App. at 169, 188.

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[5] In additional to their prior pending motions before Judge Kezele, the Burrells also filed several motions before Judge Luhan, including motions to compel discovery, amend their complaint, and order arbitration. App. at 220.

The district court denied the motion, refusing to review the Burrells' arguments that the tribal court failed to order the parties to arbitration and that the tribal court's sovereign immunity ruling was contrary to Supreme Court precedent. *Id.* at 194-201. The district court stated that it could only review the tribal court's determination regarding its jurisdiction to adjudicate the Burrells' claims, but that nothing in the Burrells' motion could be construed as such a request. Yet, the district court entertained the Burrells' argument to declare the tribal court's decision void based on a lack of due process. *Id.* at 197. Although the district court initially determined that its readjudication of issues previously resolved by a tribal court was not supported by Supreme Court precedent, it alternatively reached the merits of the Burrells' due process argument and found that the tribal court's proceedings provided adequate due process. *Id.* at 198. The district court concluded its ruling by requesting the parties to file status briefs addressing, at a minimum, the following issues: whether the stay should be lifted; whether the stay should be extended pending further exhaustion; and whether the Burrells' claims should be dismissed. *Id.* at 193-94, 201.

In the status briefs filed, the parties agreed that the Burrells had fully exhausted their tribal court remedies because it appeared that no appellate review was available. App. at 204, 220-21. The Pueblo and the individual tribal officials also maintained in their status briefs that the district court should lift the stay and dismiss the Burrells' complaint with prejudice under *res judicata* principles, arguing that the tribal court fully adjudicated the Burrells' claims. *Id.* at 203-14.

The district court subsequently lifted the stay because the parties did not dispute that the Burrells exhausted

their tribal court remedies. App. at 398. The district court also construed the Pueblo and the individual tribal officials' status brief as a second motion to dismiss raising *res judicata* as a new ground for dismissal, and provided the Burrells an opportunity to respond. *Id.* at 400. The Burrells, however, did not file a response.

On August 29, 2003, the district court issued a decision on the unopposed second motion to dismiss. App. at 402-406. The district court noted that under Fed. R. Civ. P. 41(b) and Tenth Circuit precedent, a dismissal for lack of jurisdiction (such as sovereign immunity) did not operate as a final adjudication on the merits under *res judicata* principles. *Id.* at 404. Nevertheless, the district court stated that under the doctrine of collateral estoppel, a dismissal for lack of jurisdiction precluded "relitigation of the jurisdictional issues necessarily decided on the jurisdictional question." *Id.* at 405 (citing *Matosantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1209-10 (10th Cir. 2001); *Stewart Sec. Corp. v. Guar. Trust Co.*, 597 F.2d 240, 241 (10th Cir. 1979)).

Applying this law, the district court concluded that the tribal court "necessarily determined that the Defendants were entitled to sovereign immunity with regard to all claims and that immunity had not been waived." App. at 405. As a result, the district court held that the tribal court's decision was entitled to preclusive effect. *Id.* The district court noted, as it did previously in the case, that it possessed the authority to consider whether the tribal court had jurisdiction to decide the Burrells' claims. The district court then commented:

> Plaintiffs have never made an intelligible argument challenging the jurisdiction of the Santa Ana Tribal Court over their various claims.

> Plaintiffs . . . [previously argued] that the tribal court lacked jurisdiction over the BIA lease because of an alleged arbitration clause within the lease and lacked jurisdiction over all Plaintiffs' claims because tribal courts are generally unfair. These arguments do not relate to the jurisdictional authority of the Santa Ana Tribal Court over Plaintiffs' causes of action. Plaintiffs made no further attempt to challenge the jurisdiction of the tribal court. Therefore, this Court has never addressed the jurisdiction of the Santa Ana Tribal Court as it relates to Plaintiffs' claims.

Id. at 405-06.

III. STANDARD OF REVIEW

The Burrells' notice of appeal references only the district court's August 29, 2003, order dismissing their claims based on the preclusive effect accorded to the tribal court's sovereign immunity decision. App. at 408; *see Salguero v. City of Clovis,* 366 F.3d 1168, 1172 (10th Cir. 2004) (citation omitted) (reviewing the district court's application of the doctrine of collateral estoppel de novo). The Burrells' appellate brief, however, does not limit itself to challenging the district court's collateral estoppel ruling. Rather, the Burrells spend a significant portion of their brief arguing that the district court erred by denying their motion to declare the tribal court's decision "null and void." They focus, in particular, on the alleged lack of due process afforded to them during the tribal court proceedings. We believe that the issues involved in the denial of that motion – whether, and under what circumstances, a federal court may refuse to recognize or enforce a tribal judgment – are intertwined and arguably inseparable from the question of whether to give the tribal court's judgment

preclusive effect. Therefore, we also review de novo the district court's denial of the Burrells' motion to declare the tribal court's decision "null and void." *See Bird v. Glacier Elec. Coop. Inc.*, 255 F.3d 1136, 1140-41 (9th Cir. 2001) (applying de novo review to examine whether "alleged due process violations precluded the district court's grant of comity . . . to the tribal court judgment").

IV. DISCUSSION

The threshold issue on appeal is whether any grounds exist that would prevent us from giving preclusive effect or otherwise recognizing the tribal court's sovereign immunity decision. We believe two grounds require consideration in this case: (1) lack of subject matter jurisdiction; and (2) denial of due process, including whether the Burrells enjoyed a "full and fair opportunity to litigate" their claims under the doctrine of collateral estoppel. *See Macarthur v. San Juan County*, 309 F.3d 1216, 1225 (10th Cir. 2002) (stating that this court is "unwilling to enforce judgments of tribal courts acting beyond their authority"); *Wilson v. Marchington*, 127 F.3d 805, 807 (9th Cir. 1997) (cited with approval in *Macarthur*) (holding that federal courts shall neither recognize nor enforce tribal judgments if "(1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law"); *Ryan v. City of Shawnee*, 13 F.3d 345, 348 n.2 (10th Cir. 1993) (noting that "'[c]ollateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case'") (internal citation omitted).

A. Tribal Court Jurisdiction

"Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65-66 (1978) (internal citations omitted); *see Montana v. United States,* 450 U.S. 544, 566 (1981) (determining that Indian tribes possess inherent authority to exercise civil jurisdiction over "nonmembers who enter consensual relationships with the tribe or its members, through . . . contracts, leases, or other arrangements" and "over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"); *Enlow v. Moore,* 134 F.3d 993, 996 (10th Cir. 1998) (stating that "civil jurisdiction over non-Indians on reservation lands 'presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute' ") (citation omitted).

The Supreme Court, citing the promotion of tribal self-government and principles of comity (as opposed to a jurisdictional prerequisite), has required litigants to exhaust their tribal court remedies before a district court may evaluate the existence of a tribal court's jurisdiction. *Iowa Mut.,* 480 U.S. at 15-16; *see Texaco, Inc. v. Zah,* 5 F.3d 1374, 1378 (10th Cir. 1993) (noting that "[w]hen the activity at issue arises on the reservation, [exhaustion] policies almost always dictate that the parties exhaust their tribal remedies before resorting to a federal forum"); *Smith v. Moffett,* 947 F.2d 442, 444 (10th Cir. 1991) (stating that application of the exhaustion requirement does not depend on the existence of a pending action in a tribal

court). This exhaustion policy provides a tribal court the first opportunity to examine its own jurisdiction, but is subject to the following exceptions: (1) "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,'" *Nat'l Farmers,* 471 U.S. at 857 n.21 (internal citation omitted); (2) "where the [tribal court] action is patently violative of express jurisdictional prohibitions," *id.*; (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction," *id.*; (4) "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by [the main rule established in *Montana v. United States*]," *Strate v. A-1 Contrs.,* 520 U.S. 438, 459 n.14 (1997); or (5) it is otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement "'would serve no purpose other than delay,'" *Nevada v. Hicks,* 533 U.S. 353, 369 (2001) (internal citation omitted). Allegations of local bias and tribal court incompetence, however, are not exceptions to the exhaustion requirement. *Iowa Mut.,* 480 U.S. at 19.

After exhaustion is completed, litigants may seek federal court review of a tribal court's ruling that it had jurisdiction. *Iowa Mut.,* 480 U.S. at 19; *Nat'l Farmers,* 471 U.S. at 853. But "[u]nless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court." *AT & T Corp. v. Coeur D'Alene Tribe,* 295 F.3d 899, 905 (9th Cir. 2002) (citing *Iowa Mut.,* 480 U.S. at 19).

The Burrells never accepted the district court's invitation to challenge the tribal court's jurisdiction. On appeal, the Burrells still fail to construct a clear argument challenging the tribal court's jurisdiction over their claims.

The only argument in the Burrells' filings before the district court or on appeal that could be construed as an objection to the tribal court's jurisdictional authority is their claim that the provisions of the BIA lease required arbitration of their damage claims before the Secretary of Interior.[6]

With regard to their contention that the BIA lease required arbitration of their damage claims, the Burrells argue that language in the BIA lease and its reference to 25 C.F.R. § 131, together with 25 U.S.C. § 229, operate as a waiver of the Pueblo's sovereign immunity and require arbitration of their damage claims by the Secretary of the Interior. Aplt. Br. at 23-25, 30. In support, the Burrells cite the Supreme Court's decision in *C & L Enterprises, Incorporated v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 532 U.S. 411, 414 (2001), which held that an Indian tribe's agreement to arbitrate disputes and to enforce arbitral awards in state court waived the tribe's sovereign immunity in a state court action to enforce an arbitral award. We conclude that the Burrells fail to demonstrate that an agreement to arbitrate existed or

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[6] The record reflects that the Burrells addressed the tribal court's jurisdiction to adjudicate civil rights claims in their first federal case. Nevertheless, they failed to squarely raise the issue in this case. Instead, they have merely suggested that the district court erred in the first case they filed by requiring them to exhaust their tribal remedies. In support of that contention, they note that their case involves a federal lease and constitutional torts. Noticeably absent from the Burrells' briefs is citation to the Supreme Court's decision in *Nevada v. Hicks,* which held that "tribal courts cannot entertain § 1983 suits." 533 U.S. at 369. Whether tribal courts possess jurisdiction to adjudicate § 1981 and § 1985 claims appear to be issues of first impression. But since the Burrells have not raised these issues, we will not address them at this time.

that any applicable federal law required arbitration in this instance.

First, the Burrells claim that the BIA lease contains a provision requiring arbitration before the Secretary of the Interior pursuant to "the old" 25 C.F.R. § 131. While the lease references that regulation, App. at 123, the portions of that regulation cited by the Burrells in their appellate brief do not even mention arbitration. Further, we observe that the Pueblo and the individual tribal officials pointed out to the district court that 25 C.F.R. § 131 has been repealed, that 25 C.F.R. § 162 now deals with Indian leases, and that 25 C.F.R. § 162 does not contain a provision requiring arbitration. *Id.* at 178. Even in the Burrells' first federal action, the district court rejected the Burrells' claim that 25 C.F.R. § 131 was a jurisdictional prohibition to tribal court authority. *Id.* at 250.

Second, the Burrells cite paragraph seven of the lease, entitled "Reservations," which states:

> It is understood and agreed that the lessor reserves the right to make oil and gas leases, grant rights of way and other legal grants, on the premises covered by this lease and that in event such a lease or grant is made, the lessee hereunder shall be entitled to damages for the actual loss sustained by him on account of said lease or grant, and to nothing more. It is further understood that *in the event of a dispute between the lessee hereunder and the lessee or permittee under any oil and gas lease, right-of-way, or other grant, as to the amount of such actual damages the matter will be referred to the Secretary who shall be the sole and final judge as to the amount of the said damages.*

App. at 124 (emphasis added). This paragraph, however, relates to disputes between the Burrells and lessees under an oil and gas lease, right-of-way, or other grant – not disputes between the Burrells and the Pueblo. App. Br. at 17.

Third, the Burrells rely on 25 U.S.C. § 229, which states:

> If any Indian, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or subagent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which such Indian shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time not exceeding twelve months, such superintendent, agent, or subagent shall make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury.

25 U.S.C. § 229. This argument was not presented to the district court, and it is well-settled that this court generally does not review matters raised for the first time on appeal. *See, e.g., Tillman ex rel. Estate of Tillman v. Camelot Music, Inc.*, 408 F.3d 1300, 1307 (10th Cir. 2005).

In any event, this statute does not establish that the Pueblo waived its sovereign immunity by agreeing to arbitrate disputes over the BIA lease, thereby depriving the tribal court of jurisdiction.

Lastly, the Burrells point out that they wrote to the Area Director of the BIA on June 22, 1998, demanding all their rights under the lease. The Burrells claim that this general demand encompassed a request for mandatory arbitration. This argument incorrectly assumes that the BIA lease contained a right to arbitration. Even if the Burrells could somehow argue that the Secretary of Interior failed to afford them arbitration, they waived this argument because they never sought federal review of the IBIA's decision to terminate the lease.

In sum, while lack of subject matter jurisdiction is a ground for refusing to recognize the tribal court's sovereign immunity decision, we agree with the district court that the Burrells failed to assert an intelligible or otherwise meritorious argument on this issue.

B. Collateral Estoppel-Due Process Considerations

The Burrells focus most of their attention on an alleged lack of fairness during the proceedings before the tribal court. The Burrells maintain that the tribal court refused to allow discovery pertaining to the tribal council's records of its meetings; the Pueblo's form of government, including the separation of powers between the tribal council, tribal officials, and the cacique that appoints

them;[7] the tribal court's code of laws; and the existence of a tribal court system based on principles of *stare decisis.* Aplt. Br. at 19. The Burrells assert that the Pueblo has a corrupt, totalitarian form of government that lacks a regular code of laws and allows tribal judges to serve entirely at the whim of tribal officials. The Burrells point out that the first tribal judge failed to make any rulings for almost four years, and they assert that the second tribal judge acted upon an incomplete record,[8] ignored their motions, and simply issued a one-page order dismissing their case on sovereign immunity grounds. Finally, the Burrells argue that they were entitled to basic due process rights, including rights to a fair hearing and an impartial tribal judge.[9] They believe that the district court had a responsibility to review the tribal court's handling of their case because it involves a dispute over a federal lease and alleged violations of civil rights.

In denying the Burrells' motion to declare the tribal court decision "null and void," the district court observed that the Ninth Circuit, following principles of comity utilized for recognition of foreign judgments, refuses to

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[7] The cacique appears to be the leader of the Pueblo that is appointed for life.

[8] The Burrells presume that no transcripts of the two days of hearings exist because the first tribal judge ignored requests for copies of the tapes from the hearings. Aplt. Br. at 22.

[9] We note that at one point in their brief, the Burrells ask us to overrule the Supreme Court's decision in *Santa Clara Pueblo v. Martinez.* The Burrells maintain that *Martinez* subjects United States citizens to "wide ranging violations of their basic constitutional rights by tribal officials." In *Martinez,* the Supreme Court limited federal relief under Title I of the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-1303, to a writ of habeas corpus. 436 U.S. at 69-70. Needless to say, we cannot overrule the Supreme Court.

enforce tribal court judgments if the tribal court denied a litigant due process. App. at 197 (citing *AT & T Corp.*, 295 F.3d 899; *Bird,* 255 F.3d 1136). The district court, however, ruled that a federal court's authority to readjudicate issues resolved in tribal court because of a due process failure was contrary to the Supreme Court's decisions in *Iowa Mutual* and *National Farmers. Id.* at 198. In the alternative, the district court reached the merits of the Burrells' argument and ruled that they were afforded sufficient due process. *Id.* The district court noted that the tribal court provided the Burrells two days of hearings, and stated that they were not deprived of due process merely because the tribal court ruled on sovereign immunity without ruling on the Burrells' pending motions. *Id.*

We disagree with the district court's conclusion that the Burrells could not challenge the tribal court's judgment based on due process considerations. The Supreme Court's decisions in *Iowa Mutual* and *National Farmers* do not address due process; rather, they hold that principles of comity require a federal court to give a tribal court the first opportunity to determine its own jurisdiction, subject to later review by a federal court. *Iowa Mut.,* 480 U.S. at 19; *National Farmers,* 471 U.S. at 857. Here, we conclude that both principles of comity applicable to the recognition of foreign judgments, and the collateral estoppel doctrine's requirement that a litigant have a full and fair opportunity to litigate an issue, are relevant to the case at hand.

In *Macarthur v. San Juan County,* we cited the Ninth Circuit's decision in *Wilson v. Marchington,* which found two mandatory grounds for refusing to recognize and enforce a tribal court judgment. *Macarthur,* 309 F.3d at 1225. Specifically, the Ninth Circuit held, citing principles of comity, that a federal court should neither recognize nor

enforce a tribal judgment if the tribal court lacked personal or subject matter jurisdiction, or if the defendant was denied due process of law. *Marchington,* 127 F.3d at 810. We still find *Marchington* instructive.

As to the due process ground, the Ninth Circuit determined that due process encompassed

> that there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws. Further, . . . evidence "that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable to obtain counsel, or secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition."

Id. at 811 (citing *Hilton v. Guyot,* 159 U.S. 113, 202-03 (1895); Restatement (Third) of Foreign Relations Law of the United States § 482 & cmt. b (1986)); *see also Bird,* 255 F.3d at 1152 (applying *Marchington* to hold that a closing argument in tribal court offended due process). While describing these basic due process tenets, the Ninth Circuit cautioned that comity did not require "a tribe [to] utilize judicial procedures identical to those used in the United States Courts" and that federal courts should "be careful to respect tribal jurisprudence along with the special customs and practical limitations of tribal court systems." *Id.*

Additionally, we observe that our collateral estoppel jurisprudence is consistent with the notion that due process concerns are relevant in assessing whether to recognize a tribal court judgment. *See Crocog Co. v. Reeves,* 992 F.2d 267, 270 (10th Cir. 1993) (stating that due process requires that a party have a full and fair opportunity to litigate its case) (citing *Kremer v. Chem. Constr. Corp.,* 456 U.S. 461, 482-83 & n.24 (1982)).

Collateral estoppel, or, as it is often known, issue preclusion, "bars a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim." *Park Lake Res., Ltd. Liab. Co. v. U.S. Dep't of Agric.,* 378 F.3d 1132, 1136 (10th Cir. 2004). In this circuit, application of issue preclusion requires four elements:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) *the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.*

Dodge v. Cotter Corp., 203 F.3d 1190, 1198 (10th Cir. 2000) (citation omitted) (emphasis added).[10]

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[10] Elements one and three are clearly satisfied in this case. Element two is also satisfied because a dismissal for lack of jurisdiction, such as sovereign immunity, is an exception to the final adjudication on the merits requirement. *See Park Lake,* 378 F.3d at 1136 (internal citations and quotations omitted) (stating that, although a dismissal on

(Continued on following page)

As to the "'inquiry into whether a party had a full and fair opportunity to litigate an issue . . . [we] focus on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties.'" *Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation,* 975 F.2d 683, 689 (10th Cir. 1992) (internal citation omitted); *see also Bell v. Dillard Dep't Stores,* 85 F.3d 1451, 1456 (10th Cir. 1996) (listing several authorities for the proposition that a lack of opportunity to appeal may weigh against finding that a party had a full and fair opportunity to litigate an issue).

Under the circumstances present in this case, we conclude that both principles of comity and the full and fair opportunity to litigate element of the collateral estoppel doctrine weigh against recognizing the tribal court's sovereign immunity decision. As an initial matter, we note that the close relationship between the tribal court, the Pueblo, and the individual tribal officials causes us to carefully scrutinize the tribal court proceedings in this case.

First, the procedural posture leading up to the tribal court's ruling gives this court pause. Although the first tribal judge conducted two days of evidentiary hearings, he failed to make any rulings on the parties' pending motions after four years. This provides some evidence that the Burrells did not have a forum to fully and fairly

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jurisdictional grounds is not a final adjudication on the merits, "dismissals for lack of jurisdiction preclude relitigation of the issues determined in ruling on the jurisdiction question").

litigate their claims. Further, when the Burrells returned to the tribal court, they encountered a new tribal judge who had not presided over the two days of hearings. Whether the new judge had reviewed or had any knowledge of the testimony from those hearings is unclear, but the record reflects that the first tribal judge never responded to the parties' request for a transcript of the proceedings. Without any further hearings or ruling on any other pending motions, the second tribal judge issued a one-page order granting the Pueblo sovereign immunity (and presumably extending the Pueblo's immunity to the individual tribal officials), and dismissed the Burrells' claims. This one-page order contained no reference to any testimony from the evidentiary hearing, or for that matter any explanation of the tribal court's reasoning.

Second, we are troubled by the lack of a tribal appellate court to review the second tribal judge's decision. At one point in the litigation, counsel for the Pueblo and individual tribal officials suggested that exhaustion would not be complete until the Burrells pursued an appeal before the tribal council, presided over by the governor. App. at 204. Counsel later corrected that statement, noting that when the tribal council created the "Contemporary Tribal Court," it did not provide for any appeal to the tribal council. *Id.* Not only do counsel's statements demonstrate the unavailability of any appellate review, they shed light on the nature of the relationship between the tribal court and the named defendants in this action.

In reaching our decision, we emphasize that federal courts are not the general appellate body for tribal courts. As the Supreme Court has instructed, the federal policies promoting tribal self-government and self-determination instruct us to provide great deference to tribal court

systems, their practices, and procedures. *See, e.g., Nat'l Farmers,* 471 U.S. at 856. This heed we do not take lightly. Moreover, we firmly reject the Burrells' position that the district court had a duty to monitor the proceedings before the tribal court.

Given our conclusion that the tribal court's decision is not entitled to recognition under either principles of comity or collateral estoppel, we proceed to address the merits of the sovereign immunity issue.

C. Sovereign Immunity for the Pueblo

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 754 (1998). Congress's intent to abrogate a tribe's immunity must be unequivocally expressed, while a tribe's waiver of its immunity must be clear. *C & L Enters., Inc.,* 532 U.S. at 418.

Again, the only argument that the Burrells raise to challenge the Pueblo's sovereign immunity is that the provisions of the BIA lease required arbitration of their damage claims before the Secretary of the Interior.[11] Having already determined that this argument is without merit, we conclude that the Pueblo is entitled to sovereign immunity.

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[11] The Burrells do not argue that Congress waived tribal sovereign immunity for their civil rights claims, and therefore, we do not reach those questions.

D. Claims Against the Individual Tribal Officials

An Indian tribe's "sovereign immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him." *Tenneco Oil Co. v. Sac & Fox Tribe of Indians,* 725 F.2d 572, 576 n.1 (10th Cir. 1984) (McKay, J., concurring). Thus, "[w]hen a complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." *Id.* at 574; *see also Burlington N.R. Co. v. Blackfeet Tribe,* 924 F.2d 899, 902 (9th Cir. 1991) (stating that a tribe's immunity extends to officials "acting in their representative capacity and within the scope of their valid authority").

Accepting the allegations in the Burrells' complaint as true, we conclude that they have sufficiently pled that the individual tribal officials acted outside of their official authority, and thus, are not entitled to sovereign immunity. The question then remains whether the Burrells' complaint states a claim for relief pursuant to 42 U.S.C. §§ 1981, 1983, or 1985, or for breach of the lease.

Both parties have briefed the merits of the Burrells' claims under Fed. R. Civ. P. 12(b)(6). At this juncture, the Burrells' § 1983 and breach of lease claims may be disposed of quickly. First, the Burrells' complaint alleges that the individual tribal officials acted under color of tribal law, as opposed to state law. *See* App. at 8 ("The conduct and omissions of the Defendants complained of were committed by persons acting under color of tribal law."); App. at 17 ("These defendant tribal officials were clothed under tribal authority at all times. . . . "). A § 1983 action is unavailable "for persons alleging deprivation of consti-

tutional rights under color of tribal law." *R.J. Williams Co. v. Ft. Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983).

We also dismiss the Burrells' breach of lease claim. The IBIA terminated the lease in May 2000, despite the Burrells' allegations that discrimination from the Pueblo and its officials amounted to a constructive termination and breach of the lease. The Burrells' failure to seek review of the IBIA's final decision prevents them from asserting a breach of lease claim here. *See, e.g., McAlpine v. United States,* 112 F.3d 1429, 1430 (10th Cir. 1997) (reviewing an IBIA decision under the Administrative Procedure Act, 5 U.S.C. §§ 551-706).

Lastly, we express no opinion as to the merits of the Burrells' § 1981 and § 1985 claims against the individual tribal officials. Instead, we remand those claims to the district court for consideration in the first instance.

Accordingly, we REVERSE the district court's decision to give preclusive effect to the tribal court's ruling and its subsequent dismissal of the Burrells' claims on that basis. However, we DISMISS the Pueblo from this action because it is entitled to sovereign immunity, and DISMISS the Burrells' § 1983 and breach of lease claims against the individual tribal officials for failure to state a claim. Finally, we REMAND the Burrells' § 1981 and § 1985 claims against the individual tribal officials for the district court to address in the first instance. We express no opinion on the merits of these remaining claims.

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McCONNELL, Circuit Judge, concurring in the judgment.

I agree with the majority that the district court improperly gave preclusive effect to the tribal court's judgment. I would reach this conclusion, however, on a much narrower ground. Instead of deciding that the court system of the Santa Ana Pueblo fails to provide a full and fair opportunity to litigate, I would reverse on the ground that the tribal court lacked jurisdiction to hear federal civil rights claims brought under 42 U.S.C. § 1981 and § 1985. We may consider the jurisdiction of the tribal court *sua sponte,* and in this case we have strong reasons to do so.

This case is essentially a civil rights action under 42 U.S.C. §§ 1981 and 1985. In *Nevada v. Hicks,* 533 U.S. 353, 366-69 (2001), the Supreme Court established that a tribal court cannot entertain claims under 42 U.S.C. § 1983, and I see no reason to distinguish the § 1983 claim in *Hicks* from the Burrells' § 1981 and § 1985 claims. (Counsel for the Pueblo essentially conceded as much at oral argument.) It follows that the tribal court was not a "court of competent jurisdiction," and its ruling is therefore entitled neither to deference nor to preclusive effect. *See Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 19 (1987) ("Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised by the LaPlantes' bad-faith claim and resolved in the Tribal Courts."); *Montana v. United States,* 440 U.S. 147, 153 (1979) (noting that collateral estoppel requires a decision by a "court of competent jurisdiction"); *Hilton v. Guyot,* 159

U.S. 113, 202-03 (1895) (requiring the same for comity). As the majority notes, the Burrells challenged the jurisdiction of the tribal court in their first federal suit but have not "squarely raise[d] the issue in this case." Op. of Briscoe, J., at 17 n.6. Two questions remain: whether we may raise the jurisdiction of the tribal court *sua sponte,* and whether we should.

There is no controlling precedent on raising the jurisdiction of the tribal court *sua sponte,* but the best conclusion is that we may do so. As a general matter, this Court disfavors enforcing judgments of tribal courts that act without jurisdiction. *MacArthur v. San Juan County,* 309 F.3d 1216, 1225 (10th Cir. 2002) ("We are unwilling to enforce judgments of tribal courts acting beyond their authority, especially where defendants have a federal right 'to be protected against an unlawful exercise of Tribal Court judicial power.'") (quoting *Nat'l Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 851 (1985)); *see also Wilson v. Marchington,* 127 F.3d 805, 811 (9th Cir. 1997) (considering it not "discretionary" but rather "a threshold inquiry" whether the tribal court had subject-matter jurisdiction).

This Court has not yet decided whether a tribal court's judgment is entitled to preclusive effect under the Full Faith and Credit Clause, U.S. Const. art. IV, § 1; 28 U.S.C. § 1738, or as a matter of comity. *MacArthur,* 309 F.3d at 1225; *cf. Marchington,* 127 F.3d at 807 (concluding "that the principles of comity, not full faith and credit, govern whether a district court should recognize and enforce a tribal court judgment"). The majority uses both approaches. Either way, it is appropriate for a federal court to consider whether the court that rendered the underlying judgment had jurisdiction to do so.

It is well established that a court may raise the issue of preclusion on its own motion, in appropriate cases. *Arizona v. California,* 530 U.S. 392, 412 (2000) (allowing that res judicata might be raised *sua sponte* in "special circumstances"); *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 230 (1995) (noting "that trial courts may in appropriate cases raise the res judicata bar on their own motion"); *Scherer v. Equitable Life Assurance Soc'y,* 347 F.3d 394, 398 n.4 (2d Cir. 2002) (noting that "a court is free to raise [res judicata] *sua sponte,* even if the parties have seemingly waived it," but also noting that a court has "no obligation to" and may even have good reasons not to raise it); *Mowbray v. Cameron County, Texas,* 274 F.3d 269, 281-82 (5th Cir. 2001) (upholding a district court's dismissal *sua sponte* on res judicata grounds); *see also* Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 18 *Federal Practice and Procedure* § 4405 (2d ed. 1990 & Supp. 2005) ("[I]t has become increasingly common to raise the question of preclusion on the court's own motion.").

It would seem to follow that a court may consider preclusion *sua sponte* to *retain* federal jurisdiction. Without a discretionary power to raise a tribal court's jurisdiction *sua sponte,* the federal court could be in the awkward position of acceding to the judgment of a court that self-evidently lacked jurisdiction. Justice requires not only recognizing the judgments of courts of competent jurisdiction but also refusing to recognize a judgment that manifestly lacks legal validity.

If we are dealing here with comity, rather than res judicata or collateral estoppel, the argument is even stronger. "[I]nquiry into jurisdiction is a part of comity analysis," *John v. Baker,* 30 P.3d 68, 72 n.14 (Alaska 2001), and a court "need not recognize a judgment of the court of

a foreign state if . . . the court that rendered the judgment did not have jurisdiction of the subject matter of the action." *Restatement (Third) of Foreign Relations Law* § 482(2)(a) (1987) (including case citations to comity analysis of tribal-court judgments). Put simply, lack of jurisdiction in a foreign court is a "universally accepted ground for refusing to recognize or enforce the judgment of a foreign state." *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* § 6 cmt. a (Apr. 11, 2005).

Venerable decisions of the Supreme Court suggest that a court may always consider the jurisdiction of a foreign court in cases where a party seeks recognition of the foreign judgment as a matter of comity. *See Thompson v. Whitman,* 85 U.S. (18 Wall.) 457, 461 (1873) ("[A]s to a foreign judgment it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or the thing."); *Rose v. Himely,* 8 U.S. (4 Cranch) 241, 268-69 (1808) (Marshall, C.J.) (concluding that as a matter of principle the personal and subject-matter jurisdiction of a foreign court "may be considered by that tribunal which is to decide on the effect of the sentence").

The Ninth Circuit has gone so far as to hold that federal courts have an obligation to determine whether the tribal court had jurisdiction before according its judgment preclusive effect as a matter of comity. *Marchington,* 127 F.3d at 810-11 ("[F]ederal courts must neither recognize nor enforce tribal judgments if . . . the tribal court did not have both personal and subject matter jurisdiction."). Whether such an inquiry is mandatory or discretionary, however, *sua sponte* consideration appears to be the accepted practice:

> Generally the courts feel free to examine the factual basis of jurisdiction under foreign law without considering whether the jurisdictional question was litigated in the foreign court, or whether it could be raised in a collateral attack on the judgment in the foreign country. Usually no reason is assigned for such reexamination of the foreign court's jurisdiction.

Robert B. von Mehren and Michael E. Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States,* in *Enforcement of Foreign Country Judgments* 15, 33 (Robert B. von Mehren ed., 1974); *see also Conflicts of Law, Foreign Judgments, Basis of Jurisdiction of Foreign Court Determined by Forum's Concepts,* 34 Va. L. Rev. 956, 957 (1948) ("[W]ant of jurisdiction of the court over the parties or the subject matter will always negative the validity of the judgment."). Therefore, under a comity analysis, we at least *may* consider *sua sponte* whether the tribal court had subject-matter jurisdiction.

Whether the inquiry is preclusion or comity, we have strong prudential reasons to address the jurisdiction of the tribal court in this case. First, the tribal court's jurisdiction to hear cases under § 1981 and § 1985 is a purely legal question, requiring no factual development. *See Russell v. SunAmerica Sec., Inc.,* 962 F.2d 1169, 1172 (5th Cir. 1992) (considering res judicata on the court's own motion because, "where all of the relevant facts are contained in the record before us and all are uncontroverted, [a court] may not ignore their legal effect, nor may [it] decline to consider the application of controlling rules of law to the dispositive facts, simply because neither party has seen fit to invite [its] attention to the issue by technically correct and exact pleadings").

Second, after *Hicks,* the answer is clear. *Hicks* held unequivocally that a tribal court cannot entertain claims under 42 U.S.C. § 1983. Although application of *Hicks* to claims brought under § 1981 and § 1985 is technically a question of first impression for our Circuit, there is no reason to distinguish one section of the Reconstruction-era civil rights laws from the others. The *Hicks* Court reasoned that tribal courts are not courts of general jurisdiction with respect to nonmembers, 533 U.S. at 367, and "no provision in federal law provides for tribal-court jurisdiction over § 1983 actions." *Id.* at 368. The same is true of § 1981 and § 1985.

Third, and most important, reliance on jurisdictional grounds – unlike due process – does not impugn the tribal courts. *Cf. Hilton v. Guyot,* 159 U.S. 113, 186 (1895) (noting that if a defendant can "prove that [a prior] judgment was rendered by a foreign court, which had no jurisdiction," then "he has no occasion to impeach the justice of the judgment"). To suggest that another court fails to provide a full and fair opportunity to litigate, not only in one case but as a matter of basic structure, is a step we should not take lightly. By applying *Hicks,* we would straightforwardly decide the case without impugning the basic procedural fairness of the courts of the Santa Ana Pueblo.

Accordingly, I concur in the judgment of the Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BOB BURRELL and
SUSAN BURRELL,

Plaintiffs,

v. No. CIV 02-542 WJ/DJS

LEONARD ARMIJO et al.,

Defendants.

MEMORANDUM OPINION AND ORDER DENYING MOTION TO EXERCISE JURISDICTION AND ORDERING STATUS BRIEFS

THIS MATTER comes before the Court pursuant to Plaintiffs' Motion to Exercise Jurisdiction Over This Case; for an Order that the Tribal Court's Ruling is Null and Void and for the Court to Order a Jury Trial [Docket No. 28]. Having reviewed the submissions of the parties, the applicable law, and being otherwise fully advised, I find that the motion is not well taken and will be denied.

BACKGROUND

The relevant facts of this case were stated in this Court's Memorandum Opinion and Order filed November 22, 2002 [Docket No. 22] and will not be restated. By that Memorandum Opinion and Order, the Court granted in part Defendants' Motion to Dismiss [Docket No. 9] on the grounds that Plaintiffs had not exhausted tribal remedies. The Court stayed the case until June 1, 2003 to give the Santa Ana Tribal Court an opportunity to address Plaintiff's nearly identical claims in the case filed in that court.

I ordered counsel for the parties to advise this Court on or about June 1, 2003 of the status of the action pending before the Santa Ana Tribal Court. I noted that, if appropriate, I would revisit the issue of exhaustion and the other issues raised in Defendant's motion to dismiss.

On March 14, 2003, Defendants filed a Notice of Decision by Santa Ana Tribal Court Dismissing Burrell Complaint on Grounds of Sovereign Immunity [Docket No. 24]. The notice indicated that the Santa Ana Tribal Court had dismissed Plaintiffs' tribal court Complaint on February 28, 2003. Defendants attached a copy of the Santa Ana Tribal Court order as an exhibit to the notice.

On April 2, 2003, Plaintiffs filed the instant motion. The motion makes three requests of this Court. First, Plaintiffs request that this Court deny Defendants' Motion to Dismiss. The Court assumes that Plaintiffs refer to Defendants' Motion to Dismiss [Docket No. 9] on which the Court partially ruled by the November 22, 2002 Memorandum Opinion and Order. Second, Plaintiffs ask this Court for an order declaring the order of the Santa Ana Tribal Court null and void. Third, Plaintiffs move for a jury trial on the merits of their claims.

DISCUSSION

I. MAY THIS COURT DENY DEFENDANTS' MOTION TO DISMISS?

Plaintiffs' request that this Court deny Defendants' Motion to Dismiss assumes that the issues raised in that motion are properly addressed by the Court at this time. The Court's November 22, 2002 Memorandum Opinion and Order makes clear that this Court will only address the remaining issues in Defendants' Motion to Dismiss if it

is appropriate for the Court to do so. Nothing in Plaintiffs' Motion to Exercise Jurisdiction addresses whether it is appropriate for this Court to take up the issues in Defendants' Motion to Dismiss in light of the ruling of the Santa Ana Tribal Court. Defendants' Response points this out and urges that the Court may not review the decisions of the Santa Ana Tribal Court.

Defendants are correct that this Court has no authority to review a tribal court decision rendered in a case within tribal court jurisdiction. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985); *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002); *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994). The Court may, however, consider the issue whether the tribal court had jurisdiction to decide the issues in the underlying action. *National Farmers Union Ins. Co.*, 471 U.S. at 852-53.

Plaintiffs' motion, in asking this Court to deny Defendants' Motion to Dismiss, seeks a review of the decision of the Santa Ana Tribal Court. The Santa Ana Tribal Court ruled that Plaintiffs' claims were barred by the tribe's sovereign immunity. This issue is raised in Defendants' Motion to Dismiss. Thus, if this Court were to deny Defendants' Motion to Dismiss, it would be reviewing and negativing the tribal court's decision with regard to the issue of tribal sovereign immunity. As explained above, this Court has no authority to conduct such a review of the tribal court's ruling so it may not deny or otherwise rule on Defendants' Motion to Dismiss at this time.

II. MAY THIS COURT ENTER AN ORDER DECLARING THE SANTA ANA TRIBAL COURT ORDER NULL AND VOID?

Plaintiffs' motion asks that this Court declare the ruling of the Santa Ana Tribal Court null and void. Plaintiffs assert that the tribal court incorrectly failed to order the parties to arbitration and thus failed to follow the law of *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). Additionally, Plaintiffs urge that the tribal court failed to comply with the law in *C & L Enterprises, Inc.*, when it ruled that Santa Ana Pueblo had sovereign immunity with regard to Plaintiffs' claims. Finally, Plaintiffs argue that the tribal court ruling is null and void because the tribal court denied Plaintiffs' constitutional due process rights.

As noted above, this Court may not review rulings of a tribal court except as to the issue of jurisdiction. Thus, this Court may not review the Santa Ana Tribal Court decision with regard to the tribe's sovereign immunity or with regard to the propriety of arbitration.

Plaintiffs' request that this Court declare the Santa Ana Tribal Court rulings null and void based on a lack of due process presents an apparently novel issue in the Tenth Circuit. This Court finds no authority for the Plaintiffs' proposition that they were entitled to constitutional due process in tribal court. In fact, the law is well settled that tribes are generally unconstrained by constitutional provisions such as the Bill of Rights and the Fourteenth Amendment that limit federal or state authority. *Santa Clara Pueblo v Martinez*, 436 U.S. 49, 56 (1978); *Talton v Mayes*, 163 U.S. 376 (1896). However, the Ninth Circuit, applying principles of comity for recognition of foreign judgments, refuses to recognize judgments of tribal courts

when a party was denied due process in the tribal court proceedings. *See AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002); *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1141 (9th Cir. 2000). The Ninth Circuit has only applied this principle of comity when a winning litigant in tribal court has sought recognition and enforcement in federal court of a tribal court judgment. However, the Ninth Circuit, in dicta, has stated that a federal court may readjudicate issues already resolved in tribal court when the tribal court denied due process of law to a losing party. *AT&T Corp*, 295 F.3d at 903-904.

I disagree with the Ninth Circuit's dicta in *AT&T Corp*. First, the theory that a lack of due process in a tribal court proceeding grants a federal court authority to readjudicate the issues resolved in tribal court flies in the face of controlling Supreme Court precedent in *National Farmers Union Ins. Co.*, 471 U.S. 845 and *Iowa Mut. Ins. Co.*, 480 U.S. 9. Second, tribal courts are not foreign jurisdictions. While foreign governments and their courts are not subject to the influence or control of the government of the United States, tribal governments, including tribal courts, are subject to the plenary power of the Congress of the United States, U.S. Const. Art. I § 8 cl. 3, and must afford due process of law in accordance with the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1302(8). Accordingly, the due process analysis applicable to determining whether a foreign judgment is entitled to comity is not applicable to tribal courts which are subject to the due process standard in ICRA. Finally, the Ninth Circuit's dicta, if followed, would provide an end-run around the Supreme Court's holding in *Martinez*, 436 U.S. 49. Because tribal courts must afford due process of law in accordance with ICRA, a claim that a tribal court has

violated due process is essentially a claim under ICRA. *Martinez* makes clear that the only available remedy under ICRA is habeas corpus. 436 U.S. at 61. Thus, if a federal court were to readjudicate issues already determined by a tribal court on the basis that the tribal court violated due process, the federal court would be providing an additional remedy for an ICRA violation in flagrant disregard of the intentions of Congress and the holding of *Martinez*.

Even assuming the Ninth Circuit's dicta in *AT&T Corp* is a correct statement of the law, I do not find that the Santa Ana Tribal Court proceedings were so bereft of procedural due process that the judgment of the tribal court should be declared null and void on those grounds. The due process standard that applies when determining whether to recognize a foreign judgment is found in *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895). In that case, the Supreme Court held that:

> where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon

> the mere assertion of the party that the judgment was erroneous in law or in fact.

Id. cited in Restatement (Third) of Foreign Relations Law § 482 comment b.

The Restatement outlines several grounds for nonrecognition of foreign judgments and states that a court in the United States may not recognize a foreign judgment if the judgment was rendered under a judicial system that does not provide an impartial tribunal or procedures compatible with due process. Restatement (Third) of Foreign Relations Law § 482(1)(a). In comment b to Section 482, the Restatement indicates that a foreign judgment may fail to meet the criteria for recognition when the judiciary is dominated by the political branches of government or by an opposing litigant, when a judicial system is generally unfair it its treatment of particular classes of litigation, or when a particular case shows such defects in procedures and fairness as to be not entitled to recognition and enforcement.

Plaintiffs argue that the Santa Ana Tribal Court violated principles of due process by ruling on Defendants' motion to dismiss without a hearing and by ruling on Defendants' motion to dismiss without addressing Plaintiffs' motions to arbitrate, to compel discovery, to amend the complaint, and motion for jury trial. None of these alleged actions constitutes a violation of due process principles. First, the Court notes that the Plaintiffs, in previous pleadings before this Court, admit that the Santa Ana Tribal Court heard argument on Defendants' motion to dismiss. *See* Plaintiff's Response to Motion to Dismiss [Docket No. 19] at 12. In any event, due process does not require that a court hear oral argument before ruling on a

motion provided that all parties had notice and an opportunity to respond. *Greene v. WCI Holdings Corp.*, 136 F.3d 313 (2nd Cir. 1998). If due process did require that a court provide parties an opportunity to present oral argument, the entire federal judicial system would be in violation of general principles of due process principles since many rulings in both the trial and appellate courts are based on the record and briefs without oral argument. Finally, due process does not require that a court address all of the issues raised by one party before granting an opposing party's motion to dismiss. The opposing party may assert grounds for dismissal that preclude a court from addressing issues raised by the other party. Such is the case when a party moves to dismiss based on a lack of jurisdiction or based on sovereign immunity. There was no per se due process violation by the Santa Ana Tribal Court when it ruled that Defendants were entitled to sovereign immunity before explicitly ruling on Plaintiffs' motions to arbitrate, to compel discovery, to amend the complaint, and for jury trial.

While this Court may consider whether the Santa Ana Tribal Court had jurisdiction to decide the issues before it, *National Farmers Union Ins. Co.*, 471 U.S. at 852-53, nothing in Plaintiffs' motion can be construed as asking this Court to do so. Even if I were to imply such a request from Plaintiffs' motion to declare the tribal court ruling as null and void, the Court has not been adequately briefed on the issue. The Court notes that the exhaustion requirement requires that a tribal appellate court be given the opportunity to review determinations of lower tribal courts before a federal court considers the issue of the tribal court's subject matter jurisdiction. *Iowa Mut. Ins. Co.*, 480 U.S. at 16-17. Nothing before the Court indicates

that the exhaustion requirement has been met. All that has been established is that the lower tribal court ruled before the time at which I might have reconsidered the exhaustion requirement in this case. Therefore, the Court will not treat Plaintiffs' motion as a motion for relief from the Santa Ana Tribal Court's exercise of jurisdiction.

III. MAY THIS COURT PROVIDE PLAINTIFF WITH A TRIAL BY JURY ON THE MERITS OF THEIR CLAIMS?

Based on the above, a setting for trial on the merits of Plaintiffs' claims is currently premature.

IV. STATUS OF CASE

This case is anything but a model of procedural clarity. For the sake of judicial economy and the interests of justice, the Court would like input from the parties on the status of this case. The issues the parties address should include, but need not be limited to:

1. Whether the stay should be lifted.

2. Whether the stay should be extended pending further exhaustion.

3. Whether Plaintiff's claims should be dismissed, and, if so, if dismissal should be with or without prejudice.

For each of the issues addressed, parties must provide factual and legal support for their suggestions and contentions. I will ask that each party brief the Court independently so that neither party is responding to the other party's brief.

CONCLUSION

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Exercise Jurisdiction Over This Case; For an Order that the Tribal Court's Ruling is Null and Void and for the Court to Order a Jury Trial [Docket No. 28] is hereby DENIED.

IT IS FURTHER ORDERED that each of the parties provide the Court with briefs on the status of this case by June 23, 2003.

/s/ William P. Johnson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BOB BURRELL and
SUSAN BURRELL,

Plaintiffs,

v.

No. CIV 02-542 WJ/DJS

LEONARD ARMIJO et al.,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

THIS MATTER comes before the Court pursuant to Defendants' Supplemental Brief Regarding Case Status [Docket No. 36] and Defendants' Motion to Dismiss [Docket No. 9]. For reasons stated herein, the Court will grant Defendants' Motion to Dismiss [Docket No. 9] on the basis of sovereign immunity.

BACKGROUND

The relevant facts of this case were stated in this Court's Memorandum Opinion and Order filed November 22, 2002 [Docket No. 22] and will not be restated here. By that Memorandum Opinion and Order, the Court stayed this case until June 1, 2003 to provide the Santa Ana Tribal Court an opportunity to rule on Plaintiffs' identical claims in the case filed in tribal court.

On March 14, 2003, Defendant filed a Notice of Decision that the Santa Ana Tribal Court had dismissed the tribal court case on grounds of sovereign immunity

[Docket No. 24]. A copy of the Santa Ana Tribal Court decision was attached to the Notice as an exhibit. The Tribal Court Order filed February 28, 2003 in SA-CV-123-98 ruled that the Santa Ana Tribal Court had jurisdiction over the case and that Defendants' Motion to Dismiss on Grounds of Sovereign Immunity was well taken and granted.

On April 2, 2003, Plaintiffs filed a Motion to Exercise Jurisdiction [Docket No. 28]. By Memorandum Opinion and Order filed May 20, 2003 [Docket No. 35], this Court denied Plaintiffs' motion. In that Memorandum Opinion and Order, the Court iterated that it lacks authority to review tribal court decisions rendered in a case within tribal court jurisdiction. The Court did note, however, that it has authority to consider the issue whether a tribal court had jurisdiction to decide the issue before it, but that Plaintiffs' motion could not be construed, even if read liberally, as requesting that the Court consider whether the tribal court had jurisdiction to decide the issues before it. The Court then ordered the parties to provide status briefs to the Court by June 23, 2003.

Defendants timely filed a status brief and Plaintiffs filed a brief on June 25, 2003. By Order filed July 1, 2003 [Docket No. 38], the Court addressed the issues raised in the parties' briefs. The Court lifted the stay in the case based on both parties' assertions that Plaintiffs had exhausted their tribal remedies. The Court then noted that Defendants' Motion to Dismiss [Docket No. 9] was still pending with regard to issues other than exhaustion of tribal remedies. The Court read Plaintiffs' brief as requesting action by the Court and accordingly construed Plaintiffs' brief as a motion. The Court denied Plaintiffs' motion for the reasons stated in the July 1, 2003 Order.

The Court further noted that Defendants' brief requested the Court dismiss Plaintiffs' claims on preclusion grounds not relevant prior to the tribal court decision. Thus, the Court construed Defendants' brief as a second motion to dismiss. The Court gave Plaintiffs fourteen days to respond to the arguments for dismissal raised in Defendants' brief.

As of the date of this Memorandum Opinion and Order, Plaintiffs have not filed a response to Defendants' brief nor filed a request for extension of time to file such response. Thus, the Court will rule on Defendants' motion without benefit of a response from Plaintiff.

DISCUSSION

Defendants' Supplemental Brief Regarding Case Status [Docket No. 36] argues that Plaintiffs' claims should be dismissed as they are barred by the doctrine of *res judicata* based on the Santa Ana Tribal Court decision of February 28, 2003. Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties based on the same cause of action. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5 (1979).

There is no dispute that this case involves the same parties and same causes of action as were involved in the Santa Ana Tribal Court litigation. Additionally, the principles of comity dictate that federal courts may not resadjudicate questions already resolved in tribal court. *AT&T Corp. v. Coeur D'Alene Tribe,* 295 F.3d 899, 904 (9th Cir. 2002). The question, then, is whether the Santa Ana Tribal Court rendered a judgment on the merits in its February

28, 2003 Order dismissing Plaintiffs' claims on the grounds of sovereign immunity.

Defendants state that there is a split in authority with regard to whether a dismissal on sovereign immunity grounds is a decision on the merits for *res judicata* purposes. Rule 41(b) of the Federal Rules of Civil Procedure and Tenth Circuit case law make clear to this Court that a dismissal for lack of jurisdiction such as one based on sovereign immunity does not operate as an adjudication on the merits so does not preclude a second action under the doctrine of *res judicata*. *Matosantos Commercial Corp. v. Applebee's Intl. Inc.*, 245 F.3d 1203, 1209 (10th Cir. 2001). However, under the doctrine of collateral estoppel, a dismissal for lack of jurisdiction does preclude relitigation of the jurisdictional issues necessarily decided on the jurisdictional question. *Id.* at 1209-10; *Stewart Sec. Corp. v. Guaranty Trust Co.*, 597 F.2d 240, 241 (10th Cir. 1979).

In dismissing all of Plaintiffs' claims on the basis of sovereign immunity, the Santa Ana Tribal Court necessarily determined that the Defendants were entitled to sovereign immunity with regard to all claims and that immunity had not been waived. This decision on the issue of sovereign immunity is entitled to be given preclusive effect and may not be relitigated by the parties in this case. *See AT&T Corp.*, 295 F.3d at 904. Thus, Plaintiffs' claims must be dismissed on the grounds of sovereign immunity.

I note again that I stated in the Memorandum Opinion and Order filed May 20, 2003 [Docket No. 35] that, while I have no authority to review tribal court decisions rendered in a case within tribal court jurisdiction, I do have authority to consider the issue whether the tribal

court had jurisdiction to decide the issues in the case before it. In spite of this, Plaintiffs have never made an intelligible argument challenging the jurisdiction of the Santa Ana Tribal Court over their various claims. Plaintiffs' Response to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, for Failure to State a Claim and Failure to Exhaust Tribal Remedies [Docket No. 19] did argue that the tribal court lacked jurisdiction over the BIA lease because of an alleged arbitration clause within the lease and lacked jurisdiction over all Plaintiffs' claims because tribal courts are generally unfair. These arguments do not relate to the jurisdictional authority of the Santa Ana Tribal Court over Plaintiffs' causes of action. Plaintiffs made no further attempt to challenge the jurisdiction of the tribal court. Therefore, this Court has never addressed the jurisdiction of the Santa Ana Tribal Court as it relates to Plaintiffs' claims.

CONCLUSION

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss [Docket No. 9] is hereby GRANTED and Plaintiffs' claims are hereby DISMISSED WITHOUT PREJUDICE.

/s/ William P. Johnson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BOB BURRELL and
SUSAN BURRELL,

Plaintiffs,

v. No. CIV 02-542 WJ/DJS

LEONARD ARMIJO et al.,

Defendants.

JUDGMENT

THIS MATTER came before the Court upon Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, Failure to State a Claim, and Failure to Exhaust Tribal Remedies [Docket No. 9]. Pursuant to the findings and conclusions set forth in the Memorandum Opinion and Order which accompanies this Rule 58 Judgment;

IT IS THEREFORE ORDERED and **ADJUDGED** that Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, Failure to State a Claim, and Failure to Exhaust Tribal Remedies [Docket No. 9] is GRANTED and Plaintiffs' Complaint is DISMISSED WITHOUT PREJUDICE. This disposes of this case in its entirety.

/s/ William P. Johnson
UNITED STATES
DISTRICT JUDGE

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25 USC § 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall –

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(Pub. L. 90-284, title II, Sec. 202, Apr. 11, 1968, 82 Stat. 77; Pub. L. 99-570, title IV, Sec. 4217, Oct. 27, 1986, 100 Stat. 3207-146.)

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25 USC § 229. Injuries to property by Indians

If any Indian, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or subagent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which such Indian shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time not exceeding twelve months, such superintendent, agent, or subagent shall make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be

proper, in the opinion of the President, to obtain satisfaction for the injury.

(R.S. § 2156 was from Acts June 30, 1834, c. 161, § 17, 4 Stat. 731; Feb. 28, 1859, c. 66, § 8, 11 Stat. 401.)

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42 USC §1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

(R.S. Sec. 1977; Pub. L. 102-166, title I, Sec. 101, Nov. 21, 1991, 105 Stat. 1071.)

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42 USC § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. Sec. 1979; Pub. L. 96-170, Sec. 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104-317, title III, Sec. 309(c), Oct. 19, 1996, 110 Stat. 3853.)

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42 USC §1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on

account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or

hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

(R.S. Sec. 1980.)

No. 06-721

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

BOB BURRELL and SUSAN BURRELL,

Petitioners,

v.

LEONARD ARMIJO, Governor of Santa Ana Pueblo and Acting Chief of Santa Ana Tribal Police; LAWRENCE MONTOYA, Lt. Governor of Santa Ana Pueblo; NATHAN TSOSIE, Tribal Administrator of Santa Ana Pueblo; JERRY KINSMAN, Farm Administrator of Santa Ana Pueblo; and the SANTA ANA PUEBLO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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Respondents would note that the decision of the Tenth Circuit Court of Appeals, review of which is sought by the Petitioners in this case, is reported at 456 F.3d 1159 (10th Cir. 2006).

FACTS OF THE CASE

There are two matters of relevance here that are not clearly disclosed in Petitioners' 17-page Statement of Facts: first, as the Tenth Circuit noted, all of Petitioners' claims relative to their former lease of Santa Ana lands are foreclosed by the fact that the Bureau of Indian Affairs, on February 11, 1999, found that the Petitioners were in breach of their lease in various respects, and cancelled the lease. That decision was affirmed by the Albuquerque Area Office of the BIA, by letter dated May 26, 1999, and by the Interior Board of Indian Appeals, by decision dated May 17, 2000. Petitioners sought no further review of that decision. *Burrell v. Armijo*, 546 F.3d 1159, 1163-64 (10th Cir. 2006). That fact, the court of appeals noted, "prevents [the Burrells] from asserting a breach of lease claim here." *Id.* at 1174.

Second, notwithstanding the far-ranging character of the allegations in the Complaint,[1] the only legal claim

[1] Following remand of this case to the District Court from the Tenth Circuit Court of Appeals, Defendants filed a Motion to Strike a large portion of the Complaint, on the ground that the allegations contained therein were impertinent, immaterial and scandalous, thus warranting relief under Fed.R.Civ.P. 12(f). *Burrell v. Armijo*, No. 02-CV-00542 (D.N.M.), Docs. No. 44, 45. That motion is pending.

actually asserted against the Pueblo and the individual Defendants in this case is the claim that on July 24, 1997, the Santa Ana Pueblo Tribal Council voted to buy out Petitioners' lease for $500,000, but that individual tribal officials wrongfully failed to carry out that decision. That constitutes the core of Petitioners' claim under 42 U.S.C. § 1981, *see* Complaint at ¶¶ 88-90, App. at 24,[2] and of their claim under § 1985 (which merely alleges a conspiracy by the individual Defendants to violate the Burrells' rights under § 1981); *id.* at ¶¶ 97-98, App. 25.

ARGUMENT

Rule 10 of the Rules of this Court notes that a petition for writ of certiorari "will be granted only for compelling reasons," and sets forth a list of the types of circumstances that would warrant this Court granting review of a decision by a federal court of appeals. That Rule states, in pertinent part, that this Court would consider contentions that:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with the decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by

[2] "App." references are to pages of the Appendix filed by Petitioners in the Tenth Circuit Court of Appeals.

> a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

As is apparent from the Petition, Petitioners in this case urge none of these factors, or anything like them, in support of their request that this Court undertake review of the decision of the Tenth Circuit Court of Appeals in this case. Indeed, their principal objection to the decision below is that it *follows* a governing decision of this Court (along with several other decisions of this Court that are not cited in the Petition, and numerous decisions of the Tenth Circuit and the other federal courts of appeals). The Petition presents no coherent argument supporting Petitioners' claim that this Court should reverse the decision that is its primary target, nor does it otherwise establish any sound, much less "compelling," grounds on which this Court should grant review. The Petition should be denied.

The only question for review identified in the Petition is whether the Tenth Circuit Court of Appeals "properly dismiss[ed] the Pueblo of Santa Ana based on tribal sovereign immunity." Petition at i. But virtually the entirety of Petitioners' argument is directed at the contention that this Court should overturn a nearly 30-year-old decision of this Court, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Petition fails to justify this dramatic plea with any sound legal or policy argument, however, and in any event, even were this Court to accept the

invitation, the overturning of *Santa Clara*, alone, should have no effect on the decision below.

Santa Clara involved a claim by a female member of the Pueblo of Santa Clara that a provision of Santa Clara law, that forbade children of female members of the Pueblo who married outside the Pueblo from ever becoming members of the Pueblo, discriminated against her on the basis of her sex and against her children on the basis of their ancestry, and thus violated the equal protection clause of the Indian Civil Rights Act, 25 U.S.C. § 1302(8) ("ICRA"). From the time of that Act's enactment ten years earlier, the federal district and appellate courts had repeatedly and virtually unanimously held that it was enforceable by private actions in federal court, and in most cases they had held that the ICRA abrogated tribal sovereign immunity for purposes of actions brought to enforce its terms. *See, e.g.*, *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975). In *Santa Clara*, however, considering the ICRA for the first time, this Court disagreed. In a 7-to-1 decision, the Court held that Congress had not intended to create any private cause of action for enforcement of the ICRA in the federal courts (except with respect to claims by persons who were held in tribal custody, who had been given a *habeas corpus* remedy under 25 U.S.C. § 1303), and that the exclusive forum for such enforcement was the tribal court of the tribe against whom the claim was brought. It further ruled (by a 6-to-2 vote) that in any event the Act did not abrogate tribal sovereign immunity.

The ruling that the ICRA could not be enforced by an action in federal court was by far the principal and most notable aspect of the *Santa Clara* decision. That issue has never again come before this Court. Yet for this Court to overturn that decision would be of no assistance to the

Petitioners herein, as Petitioners have never pleaded, invoked or otherwise asserted any claim under any provision of the ICRA in any pleading filed in this case, at any stage during the nearly ten years that this dispute has been in litigation. The only claims asserted in the Complaint herein are claims based on 42 U.S.C. §§ 1981, 1983 and 1985, a claim based on the Burrells' former lease, and a claim entitled "Count Based on Respondent Superior." *See* Complaint at ¶¶ 86-105; App. at 23-26.

Moreover, overturning *Santa Clara* would be of little value to Petitioners even on the tribal sovereign immunity issue, which is, after all, the sole issue on which they are actually seeking this Court's review. This Court has repeatedly, before and since *Santa Clara*, affirmed the sovereign immunity of federally recognized tribes from unconsented suit, most recently in *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); *and see C&L Enters., Inc. v. Citizens Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001) (affirming the doctrine of tribal sovereign immunity, but finding that the tribe had effectively waived that immunity by agreeing to an arbitration clause in a contract). Petitioners do not ask that this Court overturn any of those cases, yet without undoing this Court's entire body of tribal sovereign immunity jurisprudence, Petitioners would not seem able to achieve the reversal of the portion of the Tenth Circuit decision below to which they object.

It might be noted, additionally, that while Petitioners point out that this Court has acknowledged that the rule of *stare decisis* is somewhat less inflexible when the decision in question involves a matter of constitutional interpretation than it is where interpretation of a statute is involved, *see* Petition at 22-23, Petitioners fail to

acknowledge that *Santa Clara* was of the latter category, not of the former. *Santa Clara* only purported to interpret the Indian Civil Rights Act, not any constitutional provision involving Indians. Congress has been free to amend the ICRA so as to undo this Court's decision in *Santa Clara* throughout the nearly three decades since it was decided, but has taken no such action.[3]

Indeed, in *Kiowa Tribe*, while observing that the doctrine of tribal sovereign immunity appears to have "developed almost by accident," 523 U.S. at 756, and that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," *id.* at 758, this Court declined to accept the Respondent's invitation to repudiate or limit the doctrine, stating, "we defer to the role Congress may wish to exercise in this important judgment." *Id.*

Petitioners herein offer no rationale for this Court to depart from that considered judgment, nor do the facts of this case suggest any such rationale. Petitioners are asking the federal courts essentially to interpret unwritten Santa Ana Pueblo tribal law, to determine that certain tribal officials violated their official duties, based on some vaguely articulated discriminatory animus

[3] In contrast, Congress acted swiftly to undo the effect of a later decision of this Court, *Duro v. Reina*, 495 U.S. 676 (1990). That case held that the dependent status of Indian tribes under federal supervision meant that those tribes had no criminal jurisdiction over non-member Indians. Less than a year after it was decided, Congress amended the ICRA by adding to the definition of "powers of self-government" in 25 U.S.C. § 1301(2) the phrase, "and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." The validity and effectiveness of that enactment, in restoring tribal criminal jurisdiction over non-member Indians, was recently affirmed by this Court in *United States v. Lara*, 541 U.S. 193 (2004).

toward Petitioners, by failing to carry out a decision that Petitioners claim was made by the Pueblo's tribal council (and that, were it ever made, which Respondents emphatically deny, was indisputably repudiated by the Council not long afterward; *see* Armijo Aff., App. 31-34). The matters at issue in this case, thus, consist solely of internal matters of the Pueblo's traditional tribal government, and its dealings with a lessee of tribal land, and it has the very kind of "meaningful nexus to the tribe's land [and] its sovereign functions," *Kiowa Tribe*, 523 U.S. at 764 (Stevens, J., dissenting) that would presumably even have satisfied the dissenters in *Kiowa Tribe*.[4]

The lack of any principled basis for Petitioners' attack on the sovereign immunity ruling in the decision below is revealed plainly in their Petition at 27, where they back away from asking the Court to eliminate the tribal sovereign immunity doctrine altogether, and suggest rather that it should only be abrogated as to the Pueblo of Santa Ana alone, on the ground that, as Petitioners claim, "this Indian tribe is far from poor, as it has made gigantic amounts of money with its casino, and has extensive commercial enterprises." Just abrogating Santa Ana's immunity, Petitioners suggest, "could still leave open the possibility that other Indian tribes, who are not rich, could still have sovereign immunity issues addressed on a case by case basis." *Id*. There is of course nothing in the record of this case (other than the ravings in Petitioners'

[4] Respondents would note, moreover, that the Tenth Circuit did not leave Petitioners without a remedy, despite its dismissal of the claims against the Pueblo. It reversed the portion of the district court decision dismissing the claims against the individual defendants based on 42 U.S.C. §§ 1981 and 1985, and remanded those for further consideration.

Complaint, repeated in the Petition's Statement of Facts) as to the "wealth" of the Pueblo of Santa Ana (and Respondents would simply note that Petitioners' unfounded hyperbole on this subject is as baseless as it is beside the point), but this Court has never held that tribal sovereign immunity is in any respect tied to or dependent on wealth or impecuniousness. In short, Respondents respectfully suggest that Petitioners have failed to set forth any sound grounds for upsetting *Santa Clara* or the doctrine of tribal sovereign immunity, as to Santa Ana Pueblo alone or as to all or any group of Indian tribes.

That should be the end of it, but Petitioners also, in the body of their Petition (but not in the question presented), urge that their claim based on 42 U.S.C. § 1983 should be revived. *See* Petition at 24, 29. That claim was thrown out not on sovereign immunity grounds, but because it was apparent from the Complaint that no valid claim was stated under that section. As the Tenth Circuit noted, *Burrell*, 456 F.3d at 1174, the Burrells' Complaint "alleges that the individual tribal officials acted under color of tribal law, as opposed to state law." An action under § 1983, it observed, "is unavailable 'for persons alleging deprivation of constitutional rights under color of tribal law.'" *Id.* (quoting *R. J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983)). Petitioners' new theory, set out for the first time in their Petition, at 24-25, is that there might be some unknown possibility that Santa Ana received state money for its police department, which might provide a basis for arguing that defendant Leonard Armijo was acting under state rather than tribal law when he requested Mr. Burrell to stop baling hay at night, under a theory adopted in a Ninth Circuit case, *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989). This

flimsy chain of speculation fails to establish any basis for overturning the Tenth Circuit decision on this ground. First, only in the most "exceptional circumstances" does this Court address arguments made for the first time in a petition for writ of certiorari, *see, e.g., Lawn v. United States*, 355 U.S. 339, 362-63 n.16 (1958), a standard plainly not met here. But more to the point, Petitioners' factual scenario is at odds with the record (defendant Armijo was clearly acting in his capacity as Governor, not as a tribal police officer, *see* Petition at 9, especially since the Pueblo has no criminal jurisdiction over the Burrells; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)), and the mere receipt of state money by the Pueblo, if there were any, would not establish "state action" as required for a § 1983 claim, even under *Evans*. In that case, the tribal officers were also employed by the City of Browning, and were allegedly acting in that capacity, in concert with city police officers. 869 F.2d at 1348. No facts anywhere close to those are even imagined by Petitioners, much less suggested by the record here. Petitioners' suggestion that the § 1983 claim might have some viability is merely frivolous.

CONCLUSION

For the foregoing reasons, Respondents respectfully urge that the Petition be denied.

Respectfully submitted,

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